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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 37

ALLEN L. NILVA, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 13, 1956

CERTIORARI GRANTED APRIL 1, 1956

IN THE

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 15,224

CRIMINAL

ALLEN I. NILVA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

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**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

TRANSCRIPT OF RECORD

An Order to Show Cause was issued by the Honorable Charles J. Vogel, then United States District Judge for the District of North Dakota, under date of April 23, 1954, directed to Allen I. Nilva, requiring the said Allen I. Nilva to appear before the United States District Court for the District of North Dakota at Bismarck, North Dakota, on April 27, 1954, and show cause why he should not be held in criminal contempt for obstructing the administration of justice. Said Order to Show Cause reads as follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Criminal No. 8158

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELMO T. CHRISTIANSON and HERMAN PASTER,

Defendants.

ORDER TO SHOW CAUSE

To: ALLEN I. NILVA:

Pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, you are hereby ordered to appear at 10:00 o'clock a.m. on the 27th day of April, 1954, before this Court at Bismarck, North Dakota, and show cause, if any you have, why you should not be held in criminal contempt for obstructing the administration of justice by the following acts:

1. Giving false and evasive testimony under oath on April 1, 1954, upon answering, as vice-president of the Mayflower Distributing Company, subpoenas duces tecum directed to the Mayflower Distributing Company in the case of *United States of America v. Elmo T. Christianson and Herman Paster*, Criminal No. 8158;

2. Disobedience to subpoena duces tecum No. 78, directed to the Mayflower Distributing Company, in the case of *United States of America v. Elmo T. Christianson and Herman Paster*, Criminal No. 8158, in that the following articles were not produced, as required thereby:

(a) Original ledger sheet reflecting the account of Stanley Baeder, November 1, 1950 through August 30, 1951;

(b) Sales invoice #4057 dated 1/22/51 in the amount of \$1,100.00 for sale of 4 Bally Triple Bells to Stanley Baeder;

(c) Original ledger sheet reflecting the account of Robert Sande, November 1, 1950 through August 30, 1951;

(d) Invoice #3956 dated 1/11/51 in the amount of \$550.00 for the sale of 1 Evans Races to Robert Sande;

(e) Invoice #3968 dated 1/12/51 in the amount of \$1100.00 for the sale of 2 Evans Races to Robert Sande;

3. Disobedience to subpoena duces tecum No. 160 directed to the Mayflower Distributing Company, and disobedience to the order of the Court, made on March 29, 1954, directing the Mayflower Distributing Company to produce records forthwith, in the case of *United States of America v. Elmo T. Christianson and Herman Paster*, Criminal No. 8158, in that the following articles were not produced, as required thereby:

(a) General ledger 1950;

(b) General ledger 1951;

(c) Journal 1950-1951;

(d) Check Register 1950-1951;

(e) Purchase Journal 1950-1951;

(f) Perpetual Inventory 1950-1951;

(g) Cancelled checks and bank statements: November and December, 1950; January and February, 1951;

(h) Invoices for sales of games, slots, consoles to customers, 1950-1951;

(i) Credit memos for miscellaneous credits; slot machines, and consoles acquired from customers, 1950-1951;

(j) C.O.D. sales invoices (cash sales of parts, games, slots), 1950-1951;

(k) Parts invoices for sale of parts, 1950-1951;

(l) Stock tags (Inventory identification tags on slots sold, 1950-1951);

(m) Sales orders;

(n) Receiving department orders (record data on all incoming items, games, slots, etc., date received, method of transportation, from whom received);

(o) Shipping department records (records all outgoing items—games, slots, consoles, etc., date shipped consignee, carrier, etc.);

(p) Bills of lading, copies received by transportation companies;

(q) Record of shipments from Mayflower, Omaha;

(r) Correspondence files between (1) Mayflower and Bally Mfg. Co., (2) Mayflower, Omaha, and Mayflower, St. Paul, (3) Mayflower, Omaha, and W. D. Johnson, and (4) Mayflower and Pete Weyh;

(s) Copies of Weekly Reports (financial report of Omaha office);

(t) Work sheets (reflecting stock on hand in Omaha);

(u) Purchase file (containing invoices and notations on cash purchases of slots in December, 1950 and January, 1951);

(v) Miscellaneous petty cash file;
all for the period from July 1, 1950, through April 30, 1951.

Dated at Bismarck, North Dakota, this 23rd day of April, A.D. 1954.

CHARLES J. VOGEL
Judge, United States District Court

Proceedings had and testimony given under date of April 1, 1954, all in chambers in the case of United States v. Elmo T. Christianson and Herman Paster, Criminal No. 8158, are as follows:

Mr. Dibble: Your Honor, two or three days ago we had this subpoena duces tecum argument out and we thought we had it settled and that Mr. Murphy, I believe, told us that he was going to produce these, and then yesterday we brought it up again and he said he would produce them this morning. Now this morning they come in with only the records of the new machines that they bought from Bally. Did you speak to Mr. Johnson?

Mr. Mills: Mr. Johnson advised me that the rest of the records were turned over to the Government at St. Paul in a previous case. Now, I have checked with one of the men that was working down there and it was his recollection that no such records were turned over down there.

Mr. Dibble: We are not saying that that is not true. It is putting us at a handicap. If they had told us that two or three days ago, certainly Mr. Murphy would have known they were turned over; he tried the case. If they were turned over, we would like to know. We can get them.

Mr. Murphy: Here, Mr. Dibble, get this straight.

Mr. Dibble: I am talking to his Honor, Mr. Murphy.

Mr. Murphy: I am stating this for the record. I am not going to be placed in the position where I had anything to do with not complying with the Court's order or the Court's request. I called, Your Honor, Mr. Nilva, who is here, after the Court made his ruling and informed him of the Court's ruling and told him what records we wanted here. Now, he has brought whatever they have as far as I know. I haven't even looked at them.

The Court: Have they been turned over to the Government?

Mr. Murphy: They have been turned over, yes.

The Court: And Mr. Dibble states that the records turned over are only records dealing with the purchase of new machines, is that right?

Mr. Dibble: That's right.

The Court: And it is your position that there are other records indicating the purchase of used machines?

Mr. Dibble: Yes, Your Honor.

The Court: And those are the records that you desire?

Mr. Dibble: Yes, Your Honor.

Mr. Murphy: Well, now, there are other records, Your Honor, with relation to the use of second-hand machines. Inventories were made of those machines and were furnished to the Attorney General. Now, those are the records that were introduced in evidence in the previous case in St. Paul.

The Court: Was that the case before Judge Donovan?

Mr. Murphy: Yes, Your Honor. They involved a shipment, I believe, of about 35 or 40 second-hand slot machines from Iowa. Those records were put in evidence in the case in St. Paul. Inventories and the other records required to be kept were furnished to the Attorney General so the Department of Justice has whatever records there are on that.

The Court: Well, now, were those records introduced in evidence in the trial of the case before Judge Donovan?

Mr. Murphy: Yes, they were. They're part of the record.

The Court: That case is in the process of being appealed to the Court of Appeals?

Mr. Murphy: Yes, Your Honor.

The Court: Are the exhibits there?

Mr. Murphy: Yes, Your Honor.

The Court: In St. Louis?

Mr. Murphy: Yes.

The Court: Is that your understanding, too, Mr. Nilva?

Mr. Allen Nilva: Your Honor, that's my understanding, with the exception that I have copies of some of the reports that were brought here to Mr. Paster this morning. Some of the exhibits are here and those that are not here are in the Appellate Court at the present time.

Mr. Dibble: What reports are you talking about?

Mr. Nilva: The reports that were furnished to the Attorney General that set forth the inventories and set forth the disposition.

Mr. Dibble: Well, of course, those didn't start until June of 1951 or August, July or August.

The Court: You are interested in prior to that time?

Mr. Dibble: That's right.

Mr. Nilva: At that time, a complete report was made, a complete record of all the machines and equipment that were on hand. That was the only—

Mr. Dibble: (Interrupting) Well, on hand as of July, but we want to know the sales and purchases prior to that.

Mr. Nilva: Well, those were the only compiled records that we had. There were no other records of any kind; any other records, why, we turned over to the lawyers that we had, other investigating agencies that examined our records and that's all that we have. I brought them all down. I have the records and the files are in the office of John W. Graff and I got them from him. We had nothing else. I got everything that we had.

The Court: Well, it's your position, then, that you do not have and the corporations do not have any of the records now referred to by Mr. Dibble?

Mr. Nilva: That's right, Your Honor. I brought all the records we have that were of a compiled nature of all the used machines and all other records are in the hands of the Appellate Court at the present time.

Mr. Dibble: He said of a compiled nature.

Mr. Nilva: Well, that's what they are. They are all compiled. That's all we have.

Mr. Dibble: You mean to tell me that in your office right now you don't have any way of telling what machines you bought during the month of January, 1951?

Mr. Nilva: Nothing other than what appears in the records that you have at the present time.

Mr. Dibble: I think, Your Honor, that we ought to have this under oath because I just can't believe that what is being stated here is true.

The Court: Very well, you may have Mr. Nilva sworn and examine him, Mr. Dibble. Do you wish to examine Mr. Nilva with reference to the records?

Mr. Dibble: If he's the one that's answering the subpoena.

Mr. Nilva: That's all right, I will be glad to answer.

ALLEN NILVA,

being produced, sworn and examined as a witness in behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Dibble:

Q. What is your position with the Mayflower Distributing Company, Mr. Nilva?

A. I am the vice president of the Mayflower Distributing Company.

Q. Do you appear here in answer to the subpoena that was issued by the Government to produce the records, the many subpoenas that were issued?

A. Yes, I do.

Q. And have you brought all the records that you could that those subpoenas asked for?

A. Yes, I have.

Q. Now, in the purchase of machines by the Mayflower Distributing Company, what records do you keep when you purchase a machine?

A. Well, if you're going to ask me about the various methods of bookkeeping records, I can't give you an answer to that. I could just say this, that in response to this subpoena I personally, with the aid of people in the office force, searched all of our records in an attempt to comply with your subpoena and have brought all of the evidence I could to comply therewith.

Q. You made a statement a minute ago about 35 or 40 machines that were purchased.

A. I didn't make that statement.

Mr. Murphy: I made that statement, Mr. Dibble.

Q. (By Mr. Dibble) Well, did the Mayflower Distributing Company purchase used slot machines during the month of January, 1951?

A. Well, now, I can't state whether they did or not. That is a matter that is now involved in the Appellate Court of the Eighth Circuit. You don't want me to answer that. That's a matter that is on appeal now and I don't think it's proper for me to answer that.

Q. Well, do the records of the Mayflower Distributing Company, Inc., show the purchase of second-hand slot machines during the month of January, 1951?

A. Now, Mr. Dibble, the records with reference to that matter have all been subpoenaed and are in evidence in the Appellate Court.

Q. Can you answer the question?

A. Well, I just answered it to the best of my ability. Any records with reference to those purchases—they are substantial, sufficiently substantial, I can assure you and they are in the Appellate Court.

Q. Will you read the question back, please?

(Whereupon, the following question was read by the reporter:)

"Q. Well, do the records of the Mayflower Distributing Company, Inc., show the purchase of second-hand slot machines during the month of January, 1951?"

A. All evidence with reference to that transaction, which is on appeal at the present time—

The Court: That doesn't answer Mr. Dibble's question, Mr. Nilva.

A. Well, if he can explain it a little further, I will be glad to answer to the best of my ability.

Q. (By Mr. Dibble) Mr. Nilva, you're an attorney, aren't you?

A. Yes, I'm an attorney.

Q. How long have you been practicing law?

A. Since 1934 or '35.

Q. And you can't get the import of that question?

A. Sure, I understand what you want and I am trying to give you the answer to the best of my ability.

Q. Will you answer the question?

A. You asked me whether there are any records with reference to the purchase of those machines?

Q. No, I didn't ask you that. I asked you, do the records of the Mayflower Distributing Company, Inc., reflect the purchase of any second-hand slot machines during the month of January, 1951?

A. Well, I don't know. I can't state whether they do or not. If there were any records, I know that the records were subpoenaed.

Mr. Murphy: May I be excused? I want to get the record in that case.

The Court: Certainly, Mr. Murphy. We will wait until you return.

A. I know that records with reference—

The Court: Just wait until Mr. Murphy comes back.

(Whereupon, Mr. Murphy left the room and returned in a few minutes, after which the hearing continued as follows:)

Q. (By Mr. Dibble) You answered the question, "I don't know." As an officer of the corporation, the Mayflower Distributing Company, Inc., who would have knowledge of whether those records show purchases or not in the month of January, 1951?

A. Well, let me state this to you, Mr. Dibble: I am an officer.

Q. I am not asking you for any statements. I want you to answer the question. If you can't answer it, say so.

A. Well, I'd like to state something that I think is—

Q. (Interrupting) After you answer my question you can explain anything you want to but answer my question.

A. All right, I will answer it this way: I am a nominal officer of the Mayflower Distributing Company and as far as bookkeeping records, I think somebody else in the corporation would be better qualified to answer that.

Q. Who? A. Well, possibly Mr. Johnson.

Mr. Murphy: At this point, Mr. Dibble—pardon me if I interrupt here—I want to call the Court's attention to the record in the Criminal Case No. 14,783 in the United States Circuit Court of Appeals for the Eighth Circuit, and which case is now pending and under consideration by the Circuit Court of Appeals. I have here the record in the case of *United States of America v. Samuel George Nilva, Albert Gardner, Mayflower Distributing Co., Herman Paster*.

The indictment in that case, the second count, charges that "Between the dates of January 15, 1951 and March 5, 1951, in the City of St. Paul, Minnesota, and its environs, and in the States of Iowa, Illinois, and Wisconsin, the defendants * * * conspired" with each other knowingly to transport, contrary to the provisions of Section 1172, by means of motor vehicle transport, approximately 38 gambling devices as defined in 15 U. S. C. 1171, which is the same act.

The Court: Are you reading now from the indictment, Mr. Murphy?

Mr. Murphy: Yes, Your Honor, "an essential part of which devices were drums or reels with insignia thereon, and which when operated may deliver, as the result of the application of an element of chance, any money or property," and so forth, "to places within the State of Minnesota, namely, Minneapolis and St. Paul, Minnesota, from places outside the State of Minnesota, namely, the City of Davenport and environs in the State of Iowa, and the City of Rock Island and environs in the State of Illinois; that neither the State of Minnesota nor the Cities of Minneapolis or St. Paul had, or has enacted, a law providing for the exemption of such State or Cities from the provisions of 15 U. S. C. 1172."

Then the indictment recites five overt acts with relation to the shipment of these 38 machines. In that case, Your Honor, that is an indictment charging an offense of transporting gambling devices in interstate commerce, the same as the one that is before Your Honor at the present time. It is the same offense. It involves Mr. Paster. It covers the same period of time, or it overlaps the same period of time. Apparently the Government seeks now to secure the records with relations to these particular 38 gambling devices or the number of gambling devices involved.

I wish to file this record with the Court for the purpose that I object at this time to any inquiry or any investigation with respect to this particular transaction related to in the Minnesota indictment because it involves former jeopardy of the defendant Paster and it involves a retrial of an important phase of the indictment that apparently is before the Court, as they see it.

He has been convicted on this charge, Your Honor. The records with relation to that transaction have been introduced in evidence in court. The original records are in the

Court of Appeals in St. Louis. Now, I didn't try this Minnesota case, Your Honor. I argued it in the Circuit Court of Appeals and I prepared the record in part and I can't state specifically because this record—only the originals apparently contain the photostatic copy of the exhibits.

The Court: Does the record you have in your hand, Mr. Murphy, indicate that the exhibits or records sought by Mr. Dibble were introduced in that case and are now in the Court of Appeals?

Mr. Murphy: That's right, Your Honor.

The Court: Can you say whether or not the Mayflower Distributing Company or either one of the other corporations of the defendant Mr. Paster possess any records indicating the purchase of the machines that he is now seeking? Can you tell us that?

Mr. Murphy: Any records other than are in—

The Court: Any records other than those that are in the Court of Appeals.

Mr. Murphy: I can't say that, Your Honor, of course, but I do say, I think this is the thing that you are driving at, isn't it, Mr. Dibble, this shipment from—

Mr. Dibble: (Interrupting) Well, I understand there are more, too.

Mr. Murphy: Well, now, if it's your claim that there are more, I can only speak from the record. As far as these 38 machines, I think the Court can appreciate that at any rate they are involved and he has been tried on that, that shipment from Iowa, and I object to any evidence of any nature in respect to that because it involves double jeopardy.

The Court: That is an objection similar to the one you made the other day and which this Court overruled, is it not, when the question first came up?

Mr. Murphy: Well, no, I don't think it is, Your Honor. I haven't raised the question of former jeopardy in this case until this time. I have raised the Constitutional question to the effect that the defendant is not required to produce evidence against himself. This is another part of the same Fifth Amendment which says that persons shall not be twice placed in jeopardy for the same offense.

The Court: Of course, the defendant here is not being charged with transporting the particular machines you are referring to from Iowa into Minnesota, but Mr. Dibble, if I understand him correctly, is desirous of showing the accumulation of used and new machines during this period.

Mr. Dibble: Yes, Your Honor.

The Court: I think he is entitled to have those records.

Mr. Nilva: Your Honor, I would like to state this off the record.

Mr. Dibble: No, we don't want anything off the record.

Mr. Nilva: All right, you can have it on the record. All of the evidence with reference to the matter in which those machines were purchased, even as to the checks that were used in payment, the manner in which the checks had been cashed, who the payments were made to and for the specific amount of machines, the numbers and everything else, is in that record, Your Honor.

The Court: And does that record contain all of the records of the three corporations dealing with the material requested by Mr. Dibble in the subpoena?

Mr. Nilva: Your Honor, as far as I know, and in accordance with the search that I made, I am absolutely certain that the Paster Distributing Company, the Progress Finance Company are not involved in any way, even with this transaction.

The Court: Well, now, Mr. Johnson, who is nominally an officer of one or more of the corporations, is here under subpoena at the present time, is he not?

Mr. Dibble: Yes, Your Honor.

The Court: Do you wish to call him and examine him with reference to that?

Mr. Dibble: I would rather continue with Mr. Nilva and get him on record as to these other matters.

The Court: Very well.

Q. (By Mr. Dibble) Is there any record in the Mayflower Distributing Corporation today, in their possession today, which would reflect the purchase of second-hand coin machines, slot machines, during the month of February, 1951?

A. I have made a thorough search to the best of my ability, with the assistance of others in the Mayflower Distributing Company, and have been unable to find any records of any purchase in the month of March.

Q. February, I said.

A. Or February, 1951; that is, unless—now, I am not sure if that date includes the date these machines were purchased in Iowa, I'm not certain of that date, and if those machines were purchased in February, why, then those records are in the Court of Appeals.

Q. Are there any records, books, or documents, memoranda, in the possession of the Mayflower Distributing Company, Inc., showing the purchase of any machines during the month of March, 1951, or were there any records in the possession of that corporation at the time the subpoena was served?

A. As far as I know and to the best of my knowledge and ability there are no records.

Q. Well, you say as far as you know. Do you know whether there are or not?

A. Well, as a result of my search, as a result of the search that I have made, I have been unable to find the records you refer to.

Q. Are there any records, documents, memoranda, papers, invoices in the possession of the Mayflower Distributing Company, Inc., or any officers thereof reflecting any purchases of slot machines or used slot machines during the month of April, 1951?

Mr. Strutz: Just a minute, I think that should be limited. The indictment in this case doesn't include all of April.

A. Well, in any event, I can say to the best of my knowledge there are no records whatsoever.

Q. (By Mr. Dibble) And in answer to the four months that I have asked you about, it is just to the best of your knowledge, you are not certain, is that it? Is that your testimony?

A. Well, nobody is certain of anything. I want to qualify it as to the search that I have made and to the best of my knowledge.

Q. Well, now, when did you start the search that you made?

A. I started the search the date that the subpoena was served upon Mr. Johnson. We started immediately that day or the day thereafter. We have been searching every day, going through all kinds of notes, records.

Q. Do you have the date of the service of this subpoena?

A. Our old files. It was last week. It was last week.

Marshal Eaton: Was that served here?

A. No, that was served in St. Paul.

The Clerk: I think it came in this morning from the Marshal's office in Fargo. I don't know.

Q. (By Mr. Dibble) Will you tell us what records you examined?

A. Well, we have records in the basement where we keep all of our old files from year to year, the place where one

would ordinarily go, and I did so with the assistance of one of our clerks.

Q. Who was that clerk?

A. The clerk's name was Mr. Wesley, Clarence Wesley.

Q. Did you examine your daily ledger for the months January, February, March and April of 1951?

A. The daily ledger? I'm not sure whether we examined the daily ledger.

Q. Did you examine your monthly journal for the months January, February, March and April of the year 1951?

A. Well, now, when you're getting to—I examined all of our invoices, incoming invoices, incoming receipts.

Q. You examined all of the incoming invoices for the months January, February, March and April of 1951?

A. 1951, yes.

Q. And you examined all of your incoming receipts?

A. We have a system of noting—now, I don't know what you would term it in the accounting field because I'm not an accountant, but there is a memorandum of every item that comes in every day.

Q. Did you examine them?

A. I checked them. I checked all of them with Mr. Wesley, checked all incoming invoices, all outgoing invoices that we had, all our checks, all—well, everything that had anything to do with purchases as well as anything that had anything to do with sales. I also checked specific accounts and specific waybills, bills of lading and the records that we had.

Q. How many invoices would you say you examined, the number?

A. Well, there were thousands.

Q. And you have examined thousands of them since the subpoena was served?

A. I examined a great number of them, I would say thousands.

Q. Well, now, your first testimony was that you examined all incoming invoices?

A. All that I was able to find, that's right.

Q. Did you examine all of the incoming invoices for the months of January, February, March and April of 1951 in the possession of the Mayflower Distributing Company, Inc.?

A. I examined all that we had possession of.

Q. And there were thousands?

A. I'd say there were thousands. Of course, that included new and used machines, I would say mostly new, and for the record I want to say that I brought everything that we had as far as new, you have a complete record of that. That was easier to find because there's a better record on that.

Q. Well, where did you have the recordings of the new machines that were bought? Where did you find those?

A. That was easy because they are bought of just one or two different groups. They are easier.

Q. What kind of records were they that you found?

A. They were invoices.

Q. But you couldn't find any invoices for second-hand machines?

A. No, I wasn't able to find any.

Q. Now, how many incoming—

A. (Interrupting) Let me put it straight. There is very little machines—very few used items that are bought at any time, very few. The greater part of the business is business—all new business.

Q. You just stated that you examined thousands of invoices.

A. I didn't say whether they were new or used.

Q. You examined thousands of invoices?

A. Thousands of them, new, mostly new.

Q. How many incoming receipts do you have stored there?

A. I wouldn't know off-hand the number.

Q. Do you have a thousand?

A. I know there were large boxes full of receipts and invoices and other papers and documents and I went through everything for the year. These things are boxed up by the year.

Q. Wouldn't you have as many receipts as you would invoices?

A. I don't know.

Q. Well, every time you have an invoice you make a receipt, too, don't you?

A. Not necessarily, because you might get two or three invoices on one shipment so you'd have one receipt, and maybe two, three, five or six invoices and that doesn't correspond in correct numerical order.

Q. Would you say there would be at least one per day during that period?

A. I'd say so.

Q. That would be January, February, March and April, approximately 110 days, we'll say. Now, how many of these memorandums did you have that you told us about, memorandums of items coming in every day?

A. I couldn't say by specific number, Mr. Dibble. All I can say is that I checked them all.

Q. How long did it take you to check those memoranda, those items coming in every day?

A. How long? Well, I worked a couple of nights and I worked a couple of afternoons. What was the day of the subpoena?

Q. The Marshal has gone after that now.

A. Well, it was several days. I worked several afternoons and a couple evenings.

Q. You testified that you examined all checks that had to do with these. How many checks did you examine?

A. I didn't count them, Mr. Dibble, but there were a great number of checks.

Q. Would you say thousands?

A. It's possible. It's a highly complicated situation, because your checks are there by the month and I had to go through the checks of each and every month. That not only included the items that you asked for but items of every nature concerning the affairs of the business, so it was—it was quite a job, I can assure you.

Q. Mr. Nilva, if I had sold you five machines during the month of January, 1951, and I came to you and told you that you hadn't paid me for all of those, do you have any records that would show to the contrary in the Mayflower Distributing Company, Inc.?

A. If you had sold me five machines in 1951—

Q. (Interrupting) January, 1951.

A. And you claimed that I hadn't paid you, whether we had any records?

Q. Yes.

A. I believe we'd have that record on your account, just like Bally; if Bally sold us equipment. That's why it was easy to find any matters relating to Bally or United because we deal with them consistently. We have the records of their running accounts and it's easy to find that. I presume that would be easy.

Mr. Dibble: If the Court pleases, those are the records that we want and because of the dilatory attitude, the evasiveness of the defendants in answering the subpoena, we will ask Your Honor to impound all of the records of the Mayflower Distributing Company at their address on University Avenue and give us an order so that we can send some agents down there, some accountants to go through those books. I think it's going to necessitate a delay in the trial, but they apparently are evading the subpoena. They are just refusing to answer it when I know Your Honor knows from experience that a corporation, even though they submit records in the court—and of course, we haven't any evidence yet that these records are in the court. We will make inquiry just as soon as we can. We will get on the long distance phone and see what we can find out. I am informed that there are more machines than the ones involved in the case in St. Paul and therefore there would be records for those.

I know Your Honor knows from his experience, and I think you can almost take judicial notice of it, that a corporation does not just wipe out all of its records when they

send records to court. They keep another set of those records. They have to because, as I said, if I go back and say he didn't pay me he wouldn't have any records of that.

The Court: You are referring, I assume, to cancelled checks and that sort of thing, and ledgers which might show?

Mr. Dibble: Yes, Your Honor.

The Court: Which might show payments to various persons?

Mr. Dibble: We are agreeable to take anything that they will bring us that will show us the machines they bought. He is sitting there and telling us they don't have anything and I say it's preposterous.

Mr. Nilva: You haven't shown the Court what we did bring, Mr. Dibble.

Mr. Bangs: I would like to get a word in. You used the word "defendants". Up to date there has been no intimation that Mr. Christianson is involved in this. I would like the record to show that he is not.

Mr. Dibble: I restrict it to the people upon whom the subpoena was issued.

Mr. Murphy: I take exception to it as well, Your Honor. There is no justification for this charge on the part of the United States Attorney. The subpoena was served late. We had every right, Your Honor, to assert our Constitutional objection to it and we have done that. The subpoena is vague and indefinite and poorly prepared. It is one of those shotgun propositions requiring these people, apparently, to turn over everything they've got to the Government, without specifying particularly just what they wanted. Now, they could have specified in that subpoena what they wanted. Mr. Dibble has specified it now. He has said that in addition to these machines that came from Iowa he has the belief that there are others of these illegal machines. If he had

specified that, it wouldn't have been much trouble. I suppose they could have. They know what illegal machines, if any, were on hand, and they could have been right here the day the trial opened, but instead of that it's a broad, sweeping demand for every sort of a record that the company has.

The Court: But Mr. Dibble made it quite clear the first day of this trial or the day before the jury was drawn just exactly what he wanted, Mr. Murphy.

Mr. Murphy: And the St. Paul office was promptly advised on the same day, Your Honor.

Mr. Dibble: The Court sees, from the attitude that they have adopted to the subpoena, the reason for putting in what Mr. Murphy calls a shotgun blast.

Mr. Nilva: Well, I understand you wanted certain matters with reference to Bob Sande. You have them there. I brought them in.

Mr. Mills: In that regard, at the last trial, the ledger sheet from Bob Sande, it was testified to by Mr. Johnson, I believe, that they could not find the original one and so a duplicate copy was sent down and it showed no transactions of any nature, I think it was after January 1st, in his account. We had reason to believe that was inaccurate and we therefore asked that they produce the records from which the substitute sheet was made up. Now, they have today brought in a file which we have not had an opportunity of examining.

Mr. Nilva: Not only on Bob Sande.

Mr. Mills: The file which they brought in may be completely accurate and adequate in the matter of Bob Sande. I have not had an opportunity of examining that yet, so I don't want to say that it is accurate or adequate until I have had an opportunity of looking at it.

Mr. Dibble: We are not here on that matter at this time, Your Honor.

The Court: You are asking now that the Court order the impounding of all of the records of the Mayflower Distributing Company alone or do you include the other two corporations?

Mr. Dibble: Well, since they are all in the same building and the same place, I think we'd better ask that of all three corporations, because they may take them out and say that these are the Mayflower records and these over here are Paster records and they may move them from one to the other. We don't know what they are going to do when they are evading the subpoena the way they are.

The Court: Mr. Dibble, I feel that your request is justified, in view of what I have heard here this morning, and I am going to grant your request and I believe the order should be written. I am going to ask that you prepare it and bring it to me.

Mr. Dibble: And may we ask the Marshal to inform the Marshal in St. Paul of this order and that it is on its way so that he can post a man at this place and see that none of the records are taken in or taken out until we can serve the order there and get down there?

The Court: The Marshal is so instructed.

Mr. Murphy: May the record show, Your Honor, an objection to that on the ground that there is a lack of foundation.

The Court: Of course, yes, and the objection will be overruled. Now, of course, it's ten minutes to twelve and we won't start until this afternoon at two o'clock. You indicated, Mr. Dibble, that this may cause a delay in the trial. Do you not have many more things that you can go on with?

Mr. Dibble: I don't think it will unless the records are awfully voluminous and, of course, if it was right here it would be different.

The Court: You bring the proposed order to me after lunch and I will sign it and the Marshal will advise the Marshal in St. Paul.

¹⁶⁰
Subpoena No. ~~43~~ referred to in the Order to Show Cause reads as follows:

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

United States District Court for the
District of North Dakota
Southwestern Division

No. 160

United States of America

v.

Elmo T. Christianson, et al

Cr. 8158

To Mayflower Distributing Co.
2218 University Avenue
St. Paul, Minnesota

You are hereby commanded to appear in the United States District Court for the District of North Dakota at the U. S. Courtrooms in the Postoffice Building in the city of Bismarck, N. D., on the 29th day of March, 1954, at nine o'clock a.m., to testify in the case of United States v. Elmo T. Christianson, et al.

Come and bring with you all invoices, bills, checks, slips, papers, records, letters, ledger sheets, bookkeeping records, journals and copies thereof between, by or concerning Mayflower Distributing Company, made, entered, sent or re-

ceived from July 1, 1950, through April 30, 1951, both dates inclusive, reflecting any and all purchases, sales, trades, exchanges or transfers, both domestic and foreign of any and all slot machines, flat-top or console, coin operated device, whether new or used with any persons, firm or concern.

The records demanded in this subpoena are in addition to those previously subpoenaed.

This subpoena is issued upon application of the United States.

March 22, 1954.

BEATRICE A. McMICHAEL, Clerk
By Florence Williams, Deputy Clerk

RETURN

Received this subpoena at St. Paul, Minnesota, on March 25, 1954 and on March 25, 1954 at 2218 University Avenue, served at on the within named Mayflower Distributing Company, by Walter Johnson, Sec'y, by delivering a copy to him.

C. ENARD ERICKSON
By John A. Mortinson

78
**Subpoena No. 100 referred to in the Order to Show Cause
reads as follows:**

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

**United States District Court for the
District of North Dakota
Southwestern Division**

No. 78

United States of America

v.

Elmo T. Christianson, et al

Cr. 8158

**To Mayflower Distributing Company
2218 University Avenue
St. Paul, Minnesota**

**You are hereby commanded to appear in the United States
District Court for the District of North Dakota at the U. S.
Courtrooms in the Postoffice Building in the city of Bismarck,
N. D., on the 22nd day of March, 1954, at nine o'clock a.m., to
testify in the case of United States v. Elmo T. Christianson,
et al, and bring with you all originals and copies of all books,
records, letters, memoranda and papers of the above-named
company concerning or pertaining to transactions or deal-
ings with:**

Neil Van Berkum, Minot, N. D.

Jack Backus, Jamestown, N. D.

William Beaudoin, Dickinson, N. D.

Gerald Boren, Bismarck, N. D.

George Binek, Dickinson, N. D.

Lee K. Andrews, Bismarck-Mandan, N. D.
James Brastrup, Grand Forks, N. D., and
East Grand Forks, Minn.

Frances Schoefter, Valley City, N. D.

B. R. Couch, Grand Forks, N. D.

Stanley Baeder, New Rockford, N. D.

I. F. LaFleur, Jr., Devils Lake, N. D.

Robert Sande, Williston or Minot, N. D.

James Stearns, Minot, N. D.

H. L. Knudson, Fargo, N. D.

A. E. "Bobby" Ahern, LaMoure, N. D.

Robert Agnew and/or Dikota Amusement
Company, Dickinson, N. D.

made, entered, received, prepared, corrected or sent from November 1, 1950, through August 30, 1951, both dates inclusive, including but not limited to:

- (1) All invoices, freight bills, cancelled checks concerning the shipment of merchandise, parts or units of coin-operated amusement devices or gambling devices.
- (2) All letters, bookkeeping records, receipts or cancelled checks, notes or mortgages or agreements or records of payments from, to or between the above-named individuals and Paster Distributing Company, Mayflower Distributing Company and Progress Finance Company.

This subpoena is issued upon application of the United States.

February 26, 1954.

BEATRICE A. McMICHAEL, Clerk
By Florence Williams, Deputy Clerk

RETURN

Received this subpoena at Fed. Bldg., St. Paul, Minn., on March 1, 1954 and on March 1, 1954 at 3:30 p.m. at 2218 University Ave. at St. Paul, Minnesota, served it on the

within named Mayflower Distributing Company by Walter D. Johnson, Sec.-Treas., by delivering a copy to him.

Dated March 1, 1954.

C. ENARD ERICKSON

United States Marshal

By William J. Thompsen, Deputy

The following is the transcript of proceedings had on April 27, 1954, in the United States District Court at Bismarck, North Dakota, pertaining to the Order to Show Cause directed to Allen I. Nilva:

In the United States District Court for the
District of North Dakota
Southwestern Division

In re: Allen I. Nilva

Criminal No. 8320

TRANSCRIPT OF PROCEEDINGS

On the 27th day of April, 1954, at the court room of the United States District Court for the District of North Dakota, at Bismarck, North Dakota, the above-named respondent, Allen I. Nilva, appeared before the Honorable Charles J. Vogel, United States District Judge, in answer to the Order to Show Cause issued and served on the above-named respondent on the 23rd day of April, 1954, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, why said respondent should not be held in criminal contempt for obstructing the administration of justice.

The respondent was present in person and was represented by his attorney, Mr. John W. Graff, of the firm of Hoffmann, Donahue and Graff, of St. Paul, Minnesota.

At the direction of the Court, Mr. Oliver Dibble, Special Assistant to the United States Attorney, of Washington, D.C., appeared on behalf of the Court.

Whereupon, the following proceedings were had and entered of record, to-wit:

The Court: This is the return date in a contempt proceedings against Allen I. Nilva.

* * * * *

The Court: This being an order to show cause, Mr. Graff, I believe the burden is on you to proceed.

Mr. Graff: We are not the moving party, I am sure, as the Court understands. We are here in response to an order to show cause which was served upon Allen Nilva on Friday noon of last week which was made returnable here this morning. He lives in St. Paul and I live in St. Paul. He contacted me by telephone on Saturday morning at my home and told me briefly over the telephone what the situation was and I asked him to come to the office later that morning and give me the papers, although I would have little time to spend with him because of previous commitments.

I saw him briefly Saturday morning, at which time I had a copy of the Order to Show Cause and I told him that I would see him briefly on Sunday so that I might discuss the situation with him. I saw him briefly on Sunday. Monday I was in court in the morning and I was in an administrative hearing all afternoon. As a matter of fact, I had to leave the hearing to catch the train which left St. Paul last evening at six-thirty.

I mention that simply to tell the Court what my own schedule has been.

Now, Rule 42(b), under which the criminal contempt proceedings are instituted, provides in substance that the alleged contemnor shall have a reasonable time for the preparation of his defense. It is our position that the time which has been allotted, at least as far as my employment for him is concerned, is not a reasonable time. I tried to find something which might be interpretive of what a reasonable time would be within Rule 42(b). There is only one case which I could find. That was the case of *United States v. Aberbach*, reported in 165 F. 2d 713. It is a case in the Second Circuit.

In that case, they had a ten-day period within which the return was to be made and the Court in that case held that ten days was not an unreasonable time. That is all the authority that I can submit to Your Honor except the Court's own experience in these matters, that in view of the specifications there isn't and hasn't been adequate time to prepare for his defense.

The Court: In the case that you cite, Mr. Graff, was that a matter of a contempt being committed in the presence of the Court?

Mr. Graff: I think it was, Your Honor. I think it was a case of indirect contempt, Your Honor. I am sure the Court has in mind the distinction that is made. One is direct and one is so-called indirect.

The Court: I think in this instance the Court could have, if it desired, proceeded under paragraph (a) of Rule 42 summarily without giving any time at all. Of course, this occurred during the trial of this case. Mr. Nilva knew about it at the time and was ordered by the Court in chambers not to leave the jurisdiction of this Court without the permission of the Court. He did know about it at least two weeks ago.

Mr. Graff: I will be glad to talk about paragraph (a), Your Honor. As I read it, the alleged contemptuous conduct occurred in the Court's chambers where Mr. Nilva was put under oath and certain testimony was taken. Now, the specification of contempt that is made is false and evasive testimony under oath. Now, assuming that he had given false testimony under oath—I will leave the evasive alone—I think there is no question that if the false testimony affected the administration of justice that the Court could then summarily have found him guilty of contempt. However, every perjury is not contempt. There is a Supreme Court case holding that very point, that perjury which doesn't mislead or obstruct justice is not punishable as a contempt.

The Court: Were you aware of the fact, Mr. Graff, that as a result of Mr. Nilva's statements under oath in chambers this Court had to issue an order impounding the records of the Mayflower Distributing Company and the Government had to go to considerable expense therewith?

Mr. Graff: I am aware, Your Honor, of the fact that the Court, at the conclusion of this testimony, did make an order impounding the records. The question of that being done, of course, is for the attorneys in the main case. I was aware of the fact that the Court did it because it appeared at the end of the testimony. Now, part of our request this morning, in order that we may better be able to state our defense—and I haven't had time to prepare it in written form—is to make a motion to the Court to require the Government to furnish us a bill of particulars as to what facts in that testimony they claim to be false. The rule provides, in paragraph (b), that the notice shall state the time and place of hearing, allowing a reasonable time for the preparation of a defense, and shall state the essential facts constituting the criminal contempt charge and describe it as such.

Now, what we have in the Order to Show Cause is simply the giving of false and evasive testimony. The testimony

consists of 25 pages. Now, our motion in that respect is for a bill of particulars specifying what is claimed to be false and what is claimed to be evasive.

Wherever you have a situation of so-called perjured testimony, it is, of course, elementary that you have set out the precise points which it is claimed are false. I don't think it is claimed that all of it is false. I don't know which part of it is false, but we would like to have that furnished to us and we feel that we are unable to proceed until that is furnished to us or at least until the Court has an opportunity of ruling upon it.

Now, as to specifications 2 and 3, I appreciate that the Court and Government counsel are all familiar with this particular case, and outside of a little bit that I saw in the newspaper I have no familiarity with the so-called North Dakota case upon which the Court just imposed sentence. In specification 2 there are five items which it is claimed that there was a disobedience in response to the subpoena by failing to produce them. I haven't had an opportunity of finding out, first of all, whether those five exhibits were in existence at the time of the existence of the subpoena which has been numbered 78, then whether they come within the terms of that subpoena.

No. 3 gives me much more difficulty. No. 3 contains 22 items of books which it is claimed that he is in contempt for in failing to furnish. A reference to the subpoena which was issued says that the kind of records they wanted were these, "reflecting any and all purchases, sales, trades, exchanges or transfers, both domestic and foreign of any and all slot machines, flat-top or console, coin operated device, whether new or used with any persons, firm or concern. The records demanded in this subpoena are in addition to those previously subpoenaed."

The first item in specification 3 is the general ledger for 1950. Now, in order to determine whether that ledger is an

item which is requested by this subpoena, the ledger will have to be searched to find out whether that general ledger comes within this category that I have just read. I have no other way of finding it out. There are, in addition to the general ledger, 21 different items.

Now, certainly, with a mass of investigatory material that must first be exhausted before we can proceed with the contempt proceedings, the few days of time which was given us is not adequate; at least, it's not adequate to my way of thinking. I don't see how I could prepare for a defense for him with respect to all these other items until I see those books and examine them. I don't even know whether they are here or whether they are in St. Paul. I don't know whether they were entered as evidence in this case or not. If some of them were entered as evidence in this case, there is going to be, certainly, some difficulty in perusing those records here. I have to be back in St. Paul tomorrow morning to start the trial of a case.

We feel that under all the circumstances we need an adequate time to prepare for his defense. I can't tell the Court even what his defense will be. Now, I will be glad to answer any questions that I may not have made clear, but we feel that we want two things: One, time within which to prepare for his defense, which the rule plainly contemplates; and, two, we would like a bill of particulars as to the first specification.

The Court: Mr. Dibble?

Mr. Dibble: If the Court pleases, counsel apparently is proceeding on the assumption that this is an action brought by the United States Government. I would like to make it clear, first, that this is an action brought by the Court for abuse of the proceedings before the Court and not by the Government. The Government in this case acts merely as an adviser to the Court.

Secondly, I think that the respondent has certainly had sufficient time to answer the charges set out here. He is an attorney. He is well aware of the statements which he made which are not true and those which are evasive. He can give his counsel in ten minutes the answer to every question counsel has asked this morning. The respondent has had a transcript of his testimony for quite some time and there appears to be absolutely no substance in the request made here.

If we were dealing with somebody of low intelligence, without legal training, it would be a different proposition. But we have a man here who has had legal training, who is a lawyer, and who even said in chambers that he didn't need a lawyer to defend him. All these requests that counsel has made are solely for the purpose of delaying this proceedings. That is the only reason in the world I can see, because if anyone has knowledge of the information that was requested by counsel, it is the respondent.

Mr. Graff: May I say simply, in answer to Government counsel, that there is no question about the fact that we are asking for additional time. Now, nothing would delight me any more than to be able to come back to North Dakota and spend the necessary time to thresh this matter out, but I do think that common justice requires that he have counsel for his defense and that we have an adequate period of time to prepare for his defense. That is elementary to me. Now, I am asking for time, but I am asking for it in good faith and I am not asking for it just for delay, as counsel seems to indicate. I think the rule contemplates that we have an adequate period of time. That's all we are asking for.

The Court: I think, Mr. Graff, you possibly overlook the fact that this contempt, if it be found such, occurred on April 1st, is that correct?

Mr. Dibble: I think that is right, Your Honor.

The Court: And that some days thereafter Mr. Nilva was well aware of the fact that a proceedings of this type

was contemplated because he was ordered to remain within the jurisdiction of the Court until that case was over with, and at that time he did state in chambers that he was an attorney and he did not need an attorney to represent him. The only reason the proceedings did not go forth at that time was because I feared it might affect the jury before whom we were trying the preceding case.

The records of which you speak, I believe, have all been received in evidence or still are in the possession of the United States Marshal here in this building. They have been impounded by order of the Court and they are still under the jurisdiction of the Court. It is ordered that you have access to them. We will continue this matter until three o'clock this afternoon. We will then proceed.

Whereupon, the Court stood at recess until three o'clock p.m. of said Tuesday, April 27, 1954.

Afternoon Session, Tuesday, April 27, 1954

Pursuant to adjournment as aforesaid, at 3:00 o'clock p.m. of said Tuesday, April 27, 1954, the Court met, present and presiding as before, and the hearing continued as follows:

The Court: You may proceed, Mr. Graff.

Mr. Graff: May the record show, Your Honor, that our proceeding at this time is in compliance with the order of the Court entered this morning overruling our motion for a continuance to some further time. Now, I want the record to show clearly that our appearance here is in compliance with the order of the Court and we are not waiving any of our rights with respect thereto.

The Court: The record will so indicate and the Court thoroughly understands that. By the way, were you given by the reporter a copy of some of the proceedings held in chambers on April 15, 1954?

Mr. Graff: I was, Your Honor. In order that the record may also be clear, Your Honor, did I understand the action of the Court this morning was to deny our oral motion for a bill of particulars with respect to the first specification in the Order to Show Cause?

The Court: You were quite correct. That transcript, as you pointed out, is 25 pages long but only about half of it is applicable to the respondent.

Mr. Graff: Yes, but so the record may be clear, it stands that the Court has overruled our motion for a bill of particulars with respect to the first specification?

The Court: That is correct.

Mr. Graff: Requesting that there be specified what portion of the testimony is false and what portion was evasive.

The Court: What do you have to say about that, Mr. Dibble?

Mr. Dibble: Your Honor, a bill of particulars is to inform the defendant of the different elements of the offense and the defendant is not entitled to a bill of particulars when the knowledge which he asks for in the bill of particulars is particularly and peculiarly in his possession; and of course, if there is anybody in this court room that knows which is evasive and which is false in that transcript, it is the respondent here.

Mr. Graff: May I state that the position of counsel for the Government begs the very question at issue. The rule clearly states this, "and shall state—".

Mr. Dibble: Which rule is that?

Mr. Graff: Rule 42(b) of the Federal Rules of Criminal Procedure. The rule clearly states, "shall state the essential facts constituting the criminal contempt charged and describe it as such." Now, I call it a bill of particulars. I did that because it was referred to in some cases. Actually, what

we are requesting is a compliance with that rule, whether it be a bill of particulars; but it is, in any event, the essential facts that we desire and describing it as such.

The Court: The record should also show that the respondent, Mr. Nilva, received a copy of a transcript of the testimony given by him on April 1st before this Court in chambers some considerable time ago, I believe at the request of your partner, Mr. Hoffmann, isn't that correct?

Mr. Graff: Well, at the time that that happened, I was in court in St. Paul and I think Mr. Hoffmann had some communication, I think with the reporter, but in any event, I have a transcript and I received it on Saturday morning last week.

The Court: But it was in the possession of the respondent, Mr. Nilva, sometime prior thereto and Mr. Nilva is an attorney.

Mr. Graff: I have no question about that.

Mr. Nilva: There is no question about that.

Mr. Graff: How long have you had it?

The Court: Wasn't it the day following the testimony that was given, Mr. Nilva?

Mr. Nilva: I can tell from the statement, Your Honor.

The Court: April 16th?

Mr. Nilva: April 16th is the date on this statement.

Mr. Graff: May the record show, then, that he received the copy of it on April 16th?

The Court: The record shall indicate that.

Mr. Graff: Now, for the purpose of these proceedings—

The Court: Pardon the interruption, but possibly I didn't rule again on your motion for a bill of particulars. Whatever it was, it is denied, for the record.

Mr. Graff: May the testimony transcribed on April 1, 1954, constitute a part of this record, Your Honor?

The Court: Yes, it may and it is so ordered.

Mr. Graff: I could take my copy and mark it but I assume we all know what it is.

The Court: I believe a copy was filed with the Clerk and is now ordered made a part of this particular proceedings.

(Which said transcript of proceedings had in chambers on April 1, 1954, is attached hereto and made a part hereof.)

Mr. Graff: And may I also inquire whether subpoena No. 78 and subpoena No. 160 were likewise made a part of the record in the contempt proceedings and if they have not been, may they be made a part of it?

The Court: If they have not been, it will be so ordered.

(Which said subpoenas Nos. 78 and 160 are attached hereto and made a part hereof.)

Mr. Graff: Thank you. At this time, we will call Allen Nilva.

ALLEN I. NILVA,

the respondent, being produced, sworn and examined as a witness in his own behalf, testified as follows:

DIRECT EXAMINATION

By Mr. Graff:

Q. Your name is Allen I. Nilva?

A. That is correct, sir.

Q. And you reside where?

A. At 1830 Hillcrest Avenue, St. Paul, Minnesota.

Q. How old a man are you? A. I'm 42.

Q. And how long have you resided in St. Paul, Minnesota?

A. Practically 42 years.

Q. Practically your entire life?

A. My entire life, practically.

Q. And what is your business or occupation?

A. I'm an attorney by profession and I am employed at the Mayflower Distributing Company and for the Paster enterprises.

Q. Following your admittance to the bar, did you practice law at St. Paul, Minnesota?

A. Yes, I did, sir.

Q. And for how long?

A. I practiced from 1935 until December, 1942, at which time I entered the service of the United States Army.

Q. How long were you in the Army?

A. I was in the Army from December of 1942 until April of 1946.

Q. At which time you were discharged?

A. I was honorably discharged.

Q. Following your honorable discharge from the Army, what did you then do?

A. Well, I continued to practice law until October, 1946, and then—

Q. (Interrupting) What happened in October, 1946?

A. I went to work for the Mayflower Distributing Company and the Paster Distributing Company, Paster enterprises.

Q. And in what capacity did you go to work for them?

A. Well, it was a general capacity. I handled minor legal matters, collection matters, contracts, leases, things of that nature.

Q. And did you become an officer in the corporations out at the Mayflower Distributing Company?

A. Yes, sir, I became vice president. I was a nominal officer of most of the corporations.

Q. That is, Mayflower Distributing Company?

A. Yes, Paster Distributing Company and Holly Sales Company. We have the Beverage Dispensing Company, The Dairy-Way, Inc., Advance Construction Company, Finance—Progress Finance Company.

Q. And those are the corporations? A. Yes, sir.

Q. And what about Paster enterprises?

A. That's not a corporation. That's just Herman Paster and Cecelia Paster, his wife.

Q. A partnership? A. That's right, sir.

Q. You are not in that partnership?

A. No, I'm not, sir.

Q. You are related to Herman Paster? A. Yes, sir.

Q. And in what manner are you related?

A. I'm his brother-in-law, sir.

Q. He's married to your sister, Cecelia?

A. That's correct, sir.

Q. Now, during the period of time that you have been associated with the various Paster enterprises, if I may call them such, have you acted as the counsel for these enterprises or has your work been as you have described it?

A. I have been counsel in a limited way but all legal matters regarding trial have been—other counsel have been engaged. The corporations have all been incorporated by other counsel.

Q. So that your work with these enterprises has been of a minor legal capacity and also administrative work?

A. Well, it's been in a legal capacity as far as contracts, leases, purchases of real estate, construction contracts. I've kept busy.

Q. Now, a subpoena, which is a part of this record, being subpoena No. 160, was directed to the Mayflower Distributing Company requesting them in Criminal Case No. 8158 to produce certain records here on March 29, 1954, at nine o'clock a.m. According to the copy of the subpoena which was furnished to me, that was not served upon you?

A. No, sir. I understand that was served on W. D. Johnson, the secretary and treasurer.

Q. And the date of service on Mr. Johnson was March 25, 1954?

A. Well, if the record so indicates.

Q. The copy I have indicates that, the conformed copy, and that was served at St. Paul?

A. I believe so.

Q. By Mr. Mortinson of the Marshal's office at St. Paul. Now, did you see that subpoena after it was served upon Mr. Johnson?

A. I believe I did see it shortly thereafter, but I did not make any careful examination thereof.

Q. Who is Walter D. Johnson?

A. Mr. Johnson is the secretary and treasurer, I believe, of the Mayflower Distributing Company.

Q. And was it understood that he was to compile the records which were requested by the subpoena as you understood it?

A. Yes, sir, I believe it was his duty to comply therewith.

Q. Now, then, Walter Johnson proceeded to come up to Bismarck, North Dakota, and he was up at Bismarck, North Dakota, when you first heard about your responsibility about attempting to comply with this subpoena?

A. Well, let me put it this way: He was in Bismarck, North Dakota, when I received a call to bring up certain of the records.

Q. All right. Now, first of all, from whom did you get the call?

A. I got the call from Mr. Johnson.

Q. And where was Mr. Johnson at that time?

A. He was in Bismarck, North Dakota.

Q. Where were you at that time?

A. I was in St. Paul, Minnesota.

Q. All right. What was the message that Mr. Johnson gave you with respect to this subpoena?

A. Well, I think I have to bring out that in the meantime there was a motion prepared and presented to the Court to suppress any of the evidence or the records requested in the subpoena due to the fact that they were regarded as the personal property of Mr. Herman Paster, and I believe that after that motion was denied, that is the motion to suppress the subpoena and the records requested, that is when I received a call.

Q. Do you remember when it was you got the call?

A. Well, now, I arrived here April 1st. It was about two days prior thereto. Now, the motion must have been heard on March 29th, and if that is correct I must have received the call shortly thereafter.

Q. After getting the call, what did you do?

A. Well, I was told to endeavor to find the records of Robert Sande, that they wanted certain invoices and bills of lading in regard to Robert Sande particularly and they also wanted evidence or records in regard to purchases and sales of—records generally with regard to used slot machines.

Q. Did you have a copy of the subpoena at the time you made the search after receiving the call from Mr. Johnson?

A. No, I did not, sir.

Q. Tell this Court what records you did examine in an effort to comply with the message that was given to you over the telephone by Mr. Johnson?

A. I had previously searched records as well. I want to say that before I received the call from Mr. Johnson, Mr. Wesley and I searched the incoming and outgoing records of machines and I had previously searched invoice records. I had also gone over the cancelled checks for the period involved and thereafter I searched—I went to your office and I got the records relative to the last case in which Mr. Paster was involved that was on appeal and you turned over to me all the records that you had relating to used slot machines and the reports and records made to the Justice Department, to the United States Government. I also examined all of the new purchases from the Bally Manufacturing Company. I obtained all checks in payment of new purchases. I also found records relating to sales of every kind to operators in the State of North Dakota for the period involved and I brought up those records. I also found several other bills of lading that I couldn't previously find with reference to Bob Sande and brought those up with me.

Q. I have here on the desk a rather formidable display of records. Did you bring any of those records up?

A. No, I didn't bring any of those records up with me.

Q. Are you employed in any way in the accounting departments of any of these Paster enterprises?

A. No, I'm not, sir.

Q. Have you had any training in accountancy?

A. Well, I believe in my first year at the university I had elementary accounting; that was of a very minor nature.

Q. Do you have any other formal accounting training?

A. I don't claim to be a trained accountant. No, sir, I never did.

Q. Did you ever practice any kind of accounting?

A. No, sir, I did not.

Q. Did you ever do any accounting work?

A. No, sir, I never did.

Q. You don't hold yourself out as an accountant, I take it?

A. No, I do not, sir.

Q. Now, who is this man Wesley that you mentioned with whom you made the search?

A. Clarence Wesley is a clerk in the office of the Mayflower Distributing Company and Paster Distributing Company.

Q. In what part of the organization does he work?

A. Well, he works—he has various duties at the present time, since we have practically gone out of business. He handles the general accounting work, I'd say, mainly for the Paster Distributing Company and incidentally for some of these other companies.

Q. Now, when you arrived at Bismarck, North Dakota, you were present in a proceedings which were had in the chambers of the Court, at which time Mr. Dibble and Mr. Mills, Government counsel, and Mr. Murphy were present?

A. That is correct, sir.

Q. And at that time, following some statements made by the various parties, you were sworn and your testimony was taken?

A. That is correct, sir.

Q. Now, I have before me and I am reading from a copy of such transcript.

Mr. Dibble: Give me the page, please.

Q. (By Mr. Graff) Page 5. The first question is:

"Q. What is your position with the Mayflower Distributing Company, Mr. Nilva?"

A. I am the vice president of the Mayflower Distributing Company."

Is that answer correct?

A. That is correct, sir.

Q. (Reading) "Q. Do you appear here in answer to the subpoena that was issued by the Government to produce the records, the many subpoenas that were issued?"

A. Yes, I do."

A. I answered that question, sir. However, I should have qualified it at the time. I didn't realize the import of that question. I think I should have qualified it that I am bringing certain matters that I have been asked to over the telephone but I didn't give that technical—

Mr. Dibble: (Interrupting) I will have to object to this, Your Honor. The question was, "Did you give that answer?"

A. Yes, sir.

The Court: The objection is sustained.

A. That is correct, I did.

Q. (By Mr. Graff) And why did you give the answer you did?

A. Well, I had no thoughts of any evasion of any kind. I had no ulterior motives or any ideas of any kind except to produce what I had brought and turn it over.

Q. You were not reluctant to produce any records that were requested by the Court?

A. No, sir.

Q. Did you at any time in the statement which was taken from you on April 1, 1954, in the Court's chambers refuse to produce any records which were requested of you?

A. No, sir, I did not.

Q. Was there any record specifically requested of you at that time which you had failed to bring?

A. I don't believe there was any particular item requested or any particular record requested that I refused to bring, sir.

Q. Did you knowingly make any false answer to the questions put to you, either by Government counsel or by the Court, at the hearing on April 1, 1954?

A. No, I did not, sir.

Q. Is it your position now that you made then no false answers to any questions which were asked of you?

A. It's my position that I made no false answers of any kind.

Q. If any answer you gave was incorrect, it was not done knowingly?

A. That is correct, sir.

Mr. Dibble: Your Honor, we are going to have to swap these stands around. Counsel is testifying here.

The Court: The objection is sustained.

Q. (By Mr. Graff) How much time did you have to examine the records following the telephone call that you received from Mr. Johnson before you came up to Bismarck? You can answer that in terms of hours or days.

A. Well, I spent some time before I received the call, as I previously stated, searching the records and after I received the call I spent a couple of hours that very afternoon and I know I worked the next afternoon and late in the evening and, as a matter of fact, early in the morning prior to the day that I brought the records.

Q. So altogether you have—

A. (Interrupting) I worked together with Mr. Wesley in that connection.

Q. You had a little over two days, right?

A. That is after the call. I also checked records prior to the receipt of the call.

Q. Mr. Nilva, I have here in my hand what is noted on the outside as the general ledger for 1950.

Mr. Dibble: Will you mark that for identification, please, sir?

(Said ledger, handed to the reporter, was marked for identification as "Respondent's Exhibit 1, BG".)

Q. (By Mr. Gräff) Mr. Nilva, I show you what has been marked by the reporter as Respondent's Exhibit 1 and ask you if you can tell us what that is.

A. That is the general ledger for Paster Distributing Company, St. Paul; Paster, Milwaukee; Mayflower, St. Paul; Mayflower, Omaha; Paster Enterprises; and Holly Sales Company.

Q. Now, do you know of your own knowledge whether Respondent's Exhibit No. 1 contains any records pertaining to new and used slot machines during the period—the end period is April 30th, the beginning period is July 1, 1950?

A. No, I do not, sir.

(A book, handed to the reporter, was marked for identification as "Respondent's Exhibit 2, BG".)

Q. Mr. Nilva, I hand you what has been marked as Respondent's Exhibit 2. Can you identify that for us, please?

A. Yes, sir, this is the 1951 general ledger for the Mayflower Distributing Company, St. Paul; Holly Sales Company, St. Paul; Paster Distributing Company, St. Paul; Paster Distributing Company, Milwaukee; the Mayflower Distributing Company, Omaha.

Q. And when you make the identification of that exhibit you are reading from a slip that is pasted on the outside of Exhibit No. 2?

A. That is correct, sir.

Q. Now, can you tell us at this time whether Respondent's Exhibit No. 2 contains any record pertaining to new and used slot machines covering the period of July 1, 1950 to April 30, 1951?

A. No, sir, I cannot tell you whether it does.

(A book, handed to the reporter, was marked for identification as "Respondent's Exhibit 3, BG".)

Q. Mr. Nilva, I hand you what has been marked as Respondent's Exhibit 3. Will you tell us what that is?

A. Well, this is, according to what is indicated on the outer cover, the Mayflower journal from February, 1946, up to January 31, 1953, evidently.

Q. What is the book, what kind of book, do you know?

A. This is a journal.

Q. Now, can you tell from an examination of Respondent's Exhibit 3 whether that contains any records pertaining to new or used slot machines during the period of July 1, 1950, to and including April 30, 1951?

Mr. Dibble: I object to it—

A. (Interrupting) No, I cannot, sir.

The Court: Wait just a minute.

Mr. Dibble: I object to the question as being without foundation. There hasn't been any testimony that he has examined that record.

Q. (By Mr. Graff) Have you examined Respondent's Exhibit 3?

A. Yes, sir, I have examined this record, as well as the others, and from my examination—no, let me say, I examined those other two records previously and was unable to find any evidence of slot machines—

The Court: You are being asked about Respondent's Exhibit 3, the one you have in your hands now, Mr. Nilva.

A. Let me just look at it. (Witness examines said exhibit.) This one I have not examined.

The Court: The objection is sustained.

Q. (By Mr. Graff) So you don't know whether that contains any records pertaining to new or used slot machines?

A. That is correct, sir.

(A book, handed to the reporter, was marked for identification as "Respondent's Exhibit 4, BG".)

Q. I hand you respondent's Exhibit 4. Will you identify it for us, please?

A. This is a check register of the Mayflower Distributing Company from February 1, 1952, to January 31, 1953.

Q. Had you examined Respondent's Exhibit 4 prior to April 1, 1954?

A. No, I have not, sir. I went through the checks for the period and didn't examine the check register. In other words, I examined the checks for the period requested in the subpoena but didn't examine the check register.

Q. And have you with me today, following the hearing this morning, made some examination of the balance of these documents that appear on this table?

A. Yes, I have, sir.

Q. Now, specification No. 3 of the Order to Show Cause lists other items in addition to Respondent's Exhibits 1, 2, 3 and 4. One of them is a purchase journal covering the period of 1950 and 1951. Had you examined the purchase journal for 1950-1951 prior to your testimony on April 1, 1954?

A. No, I don't believe I had, sir.

Q. The next item is entitled "Perpetual Inventory 1950-1951". Had you examined the perpetual inventory for 1950-1951 prior to your testimony on April 1, 1954?

A. No, I did not, sir. I couldn't find that.

Q. The next item is entitled; "Cancelled checks and bank statements: November and December, 1950; January and February, 1951". Now, had you examined those items prior to your testimony on April 1, 1954?

A. Yes, sir. Mr. Wesley and I jointly examined cancelled checks for the period about which you inquire.

Q. And did you produce any cancelled checks and bank statements for the months of November and December, 1950, and January and February of 1951?

A. I produced—I believe I produced cancelled checks. If I could have those checks, I'd like to go through them. They were all turned over to the United States District Attorney.

Q. You did produce some, then?

A. I produced a large number of checks.

Q. Did you produce all of the cancelled checks for that period?

A. Not all of the cancelled checks for that period. I produced all of the cancelled checks that in my estimation had anything to do with the purchase of consoles or slot machines. There weren't any slot machines involved in that, I don't believe, but there were consoles, Triple Bells, all purchases from the Bally Manufacturing Company and all invoices in connection with the purchases from the Bally Manufacturing Company.

Q. The next item is entitled, "Invoices for sales of games, slots, consoles to customers, 1950-1951." Had you examined those records prior to your testimony on April 1, 1954?

A. I examined the records in that regard in the best of my ability and produced, both in the last trial and this trial, a considerable amount of evidence in that regard.

Q. Well, did you produce the ones that you feel were required by the subpoena?

A. To the best of my ability I believe I did.

Q. The next item is entitled, "Credit memos for miscellaneous credits, slot machines, and consoles acquired from customers; 1950-1951".

A. No, I didn't examine any credit memos.

Q. Of course, my question is whether you examined them prior to your testimony on April 1, '54?

A. No, I didn't examine any credit memos.

Q. The next item is, "C.O.D. sales invoices (cash sales of parts, games, slots); 1950-1951". Now, had you examined C.O.D. sales invoices just described prior to your testimony on April 1, 1954?

A. No, I did not, sir. I don't think there were any. I didn't examine them and those were contained in connection with the records that were down in the basement that Mr. Paster had to point out to the agents of the United States Government. Even they couldn't find them. He voluntarily pointed them out.

Mr. Dibble: Were you there?

A. Well, that's what I understand.

Mr. Dibble: Were you there?

A. No.

Mr. Dibble: I object to this.

The Court: Objection sustained.

Q. (By Mr. Graff) The next item is entitled, "Parts invoices for sale of parts, 1950-1951". Now, had you examined these parts invoices prior to your testimony on April 1, 1954?

A. On new parts invoices, yes, sir. Those were easy to find. The used parts invoices I couldn't find.

Q. The next item is entitled, "Stock tags (Inventory identification tags on slots sold, 1950-1951)". Now, had you examined such stock tags prior to your testimony on April 1, 1954?

A. No, sir, I didn't examine any. I wouldn't know where to find them and I couldn't find them in the course of the search that I made.

Q. The next item is entitled, "Sales orders". Now, had you examined any sales orders prior to your testimony on April 1, 1954?

A. No, sir. Those sales orders were also in the basement in such a place that I couldn't find them. I was unable to examine them.

Q. The next item is entitled, "Receiving department orders" described as "record data on all incoming items, games, slots, etc., date received, method of transportation, from whom received". Now, had you examined the so-called receiving department orders prior to your testimony on April 1, 1954?

A. I checked receiving department records of incoming and outgoing shipments. Now, these are records kept by the clerk and there was a duplicate receipt of them that I examined that I couldn't find any records of any shipments of slot machines.

Q. The next item is entitled, "Shipping department records", further described as "records all outgoing items—games, slots, consoles, etc., date shipped, consignee, carrier, etc." Had you examined such shipping department records prior to your testimony here on April 1, 1954?

A. Well, I examined the shipping—

Mr. Dibble: I am going to have to object to this; counsel is asking question after question and he can answer "yes" or "no" but he continues to talk. I ask that the witness be instructed—

A. (Interrupting) Well, I'd like to tell a complete—

The Court: Mr. Nilva, answer "yes" or "no". If your counsel wants you to elaborate, he can ask the proper question thereafter.

A. Well, Your Honor, I'd like to state the actual item that I examined.

The Court: You mean to say that you are unable to answer "yes" or "no" to the question?

A. Well, with a qualification. Well, that question, as it is asked, is very complete. I examined the records in the shipping department that are long yellow sheets that have in them the record of machines, as to when they went out and when they came in, all types of machines, and they are voluminous but they are not as detailed as the question would set forth. Those are the records I examined.

The Court: Very well.

Q. (By Mr. Graff) In connection with the shipping department records, are there any other records that you examined under the general category of shipping department records?

A. Those are the only records that I examined, sir.

Q. And you did not, I take it from your answer, examine them under the specific category stated in this specification?

A. They are not listed in specific categories. They are the records of each day's incoming or outgoing, and they are not

in as elaborate form as it set forth in the Order to Show Cause or in the statements that you set forth.

Q. The next item is entitled, "Bills of lading, copies received by transportation companies". Now, let me ask you this question: What bills of lading, if any, did you examine prior to your testimony here on April 1, 1954?

A. I examined bills of lading with the assistance of Mr. Wesley that we could find and I did produce several bills of lading that I could find that I thought fit into the category requested.

Q. And did you produce any of such bills of lading when you came up here, I take it it was the morning of April 1st?

A. I did, sir, particularly in connection with the Robert Sande account and particularly in connection with any accounts that we had in North Dakota.

Q. Which ones did you bring, speaking now generally of the class?

A. I brought all bills of lading of every kind and character.

Q. I see.

A. That I could find.

Q. Now, the next category is entitled, "Record of shipments from Mayflower, Omaha". Now, what examination, if any, did you make of records of shipments from Mayflower at Omaha?

A. I was unable to find any records of any Omaha shipments. The Omaha office has been closed for a considerable length of time. Those records were buried. I was unable to find them. When I say "buried", I mean they were somewhere where I couldn't find them and they haven't been used and I was unable to find anything.

Q. So you did not examine any record of shipments of Mayflower of Omaha?

A. That's right, sir.

Q. The next classification is entitled, "Correspondence files between (1) Mayflower and Bally Mfg. Co., (2) Mayflower, Omaha, and Mayflower, St. Paul, (3) Mayflower,

Omaha, and W. D. Johnson, and (4) Mayflower and Pete Weyh". Now, what correspondence files, if any, did you examine before your testimony on April 1, '54, of the categories of correspondence just mentioned?

A. Well, I am sure there was never any request for a specific file on Peter Weyh. I never checked anything on that, and I didn't check any of the Omaha correspondence because I couldn't know where to find them. Those records are also obsolete and buried and I checked—

Q. (Interrupting) What about the other categories, Mayflower and Bally?

A. Mayflower and Bally, I didn't check any correspondence files. I did check the purchase files.

Q. Well, I take it, then, your answer is that you did not check any of the correspondence files in the four categories that I have just mentioned?

A. That's right, sir.

Q. The next item is entitled, "Copies of Weekly Reports (financial report of Omaha office)". What part, if any, did you examine of such weekly reports prior to your testimony on April 1st?

A. I didn't check any of the records of the weekly reports. I don't think they were requested in the subpoena and those reports were not available to me. I certainly couldn't find them.

Q. The next category is entitled, "Work sheets (reflecting stock on hand in Omaha)". What examination, if any, did you make of work sheets, such work sheets, prior to your testimony on April 1st?

A. I couldn't find any work sheets of the Omaha office. I didn't find any and I didn't examine any.

Q. The next item is entitled, "Purchase file (containing invoices and notations on cash purchases of slots in December, 1950 and January, 1951)".

A. I don't think we—

Q. (Interrupting) Just a moment. What examinations, if any, did you make with respect to such purchase file prior to your testimony here on April 1st?

A. I didn't make any examination of the purchase file. I don't think we have any purchase file as such. I certainly couldn't find any.

Q. In any event, you didn't examine it?

A. I didn't examine it. I couldn't find any.

Q. The next item is entitled, "Miscellaneous petty cash file". What examination, if any, did you make of such petty cash file prior to your testimony on April 1, 1954?

A. Sir, I didn't make any examination of any petty cash file. I wouldn't know where to find it and I don't even know whether we had one.

Q. Now, as you understood the subpoena No. 160, did you produce the material that you understood that you were required to produce?

A. 160? That's the subpoena?

Q. That's the last subpoena.

A. That is the last subpoena that was served on Walter Johnson on March 25th? I produced such items as I could find and that I was told that the Government was interested in in connection with the main lawsuit.

Q. Did you intentionally fail to produce any records that may have been sought by the subpoena No. 160?

A. No, sir.

Q. Now, directing your attention to the subpoena No. 78, that is the subpoena which was served on Mr. Johnson, according to the return thereon, on March 1, 1954: That would be the first subpoena?

A. That's right, sir.

Q. Now, did you attempt to produce any of the records in connection with that subpoena?

A. I wish the Government would turn over to me the items that I brought over and if they would, I could very easily go down the line and show what I did produce.

Q. Let me show you a copy of the subpoena.

Mr. Dibble: Here are those records if you want them.

(Documents, handed to the reporter, were marked for identification as "Respondent's Exhibits 5 to 15, BG", inclusive.)

Q. (By Mr. Graff) Mr. Nilva, handing you Respondent's Exhibit 5, can you identify that for us, please?

A. Yes, sir. That is a file in reference to Neil Van Berkum of Minot, North Dakota, containing various invoices, bills of lading, containing conditional sales contracts.

Q. It contains documents?

A. Yes, sir. There are numerous documents here.

Q. Handing you Respondent's Exhibit 6, will you identify that for us, please?

A. Yes, sir, this is a file on J. F. LaFleur of Devils Lake, North Dakota, containing bills of lading—

Q. (Interrupting) Containing documents?

A. Yes, sir.

Q. Handing you Respondent's Exhibit 7, will you identify that for us, please?

A. This is a file on J. W. Stearns of Minot, North Dakota, doing business as North Dakota Sales Company.

Q. And containing various and sundry documents?

A. Yes, sir.

Q. Handing you Respondent's Exhibit 8, will you identify that for us, please?

A. This is a file on Robert Sande of Williston, North Dakota, containing conditional sales contracts, invoices, bills of lading.

Q. Handing you Respondent's Exhibit 9, would you identify that for us, please?

A. This is a file on B. R. Couch of Grand Forks, North Dakota, containing invoices and bills of lading.

Q. Handing you Respondent's Exhibit 10, will you identify that for us, please?

A. This is a file on H. L. Knudson of Fargo, North Dakota, containing invoices, bills of lading and other documents.

Q. Handing you Respondent's Exhibit 11, will you identify that for us, please?

A. This is a file on Jack Backus of Jamestown, North Dakota, containing ledger sheets, bills of lading, invoices.

Q. Handing you Respondent's Exhibit 12, will you identify that for us, please?

A. This is a file on Robert Ahern of LaMoure, North Dakota, containing a ledger sheet, invoices, bills of lading.

Q. Handing you Respondent's Exhibit 13, will you identify that for us, please?

A. This is a file on Stanley Baeder of New Rockford, North Dakota, containing chattel mortgage, letter, invoices and bills of lading.

Q. Handing you Respondent's Exhibit 14, will you identify that for us, please?

A. This is a file containing invoices of sales made by Mayflower Distributing Company to the Southern Automatic Music Company—well, these are ~~different~~ firms, World Wide Distributing Company, of Clover Bells, Triple Draw Bells and invoices of purchases made by the Mayflower Distributing Company from the Bally Manufacturing Company, together with 28 checks from Mayflower Distributing Company to the Bally Manufacturing Company for payment of machines.

Q. Covered by the invoices?

A. Covered by the invoices included in this file.

Q. Handing you Respondent's Exhibit 15, will you identify that for us, please?

A. Yes, sir. This file contains reports by the Mayflower Distributing Company to the Department of Justice, Washington, D. C., setting forth the monthly reports on various types of equipment required to be reported under the Johnson Act. They are monthly reports and inventories attached thereto, together with registered receipts and letters of inquiry and letters of responses from the Attorney General. There is one letter, July 24th, setting forth that the, "infor-

mation contained in your letters appears to conform with the requirements of the Act and has been filed accordingly". Signed James McInerney, Assistant Attorney General.

Q. Just basically, Respondent's Exhibit 15 contains correspondence and reports pertaining—

A. (Interrupting) And inventories.

Q. (Continuing) —pertaining to the registration provisions of the Johnson Act?

A. That's right, sir.

Q. Do Respondent's Exhibits 5 to 15, inclusive, constitute records maintained by the Mayflower Distributing Company in the usual course of its business?

A. As far as I know they do, sir.

Q. And was it the usual course of business of the Mayflower Distributing Company to maintain records such as Respondent's Exhibits 5 to 15, inclusive, at the time of the transactions reflected thereby or reasonably soon thereafter?

A. I believe so, sir.

Q. Now, did you produce Respondent's Exhibits 5 to 15, inclusive, containing all the documents contained therein in Bismarck on or about April 1, 1954?

A. I did, sir.

Q. And these were the records, I take it, that you compiled after receiving the call from Mr. Johnson?

A. That's right, sir, except for one thing that I'd like to add, that I also mentioned, that there were other records, checks and items of information regarding slot machines and other devices for which all records were in the Appellate Court of this Circuit in connection with the other case and, of course, I was unable to produce those records.

Q. Now, to whom did you surrender the exhibits identified as Respondent's Exhibits 5 to 15, inclusive? To whom did you give them?

A. On April 1st? Well, I gave them directly to Mr. Peterson, I believe, of the—

Q. (Interrupting) He's an F.B.I. Agent?

A. That's right, sir.

Q. Do you know whether any of the exhibits that you surrendered to Mr. Peterson when you came up here were subsequently introduced as evidence in Criminal No. 8158, which is the case against Christianson and Paster?

A. I don't know of my own knowledge, sir. I would like to add, I think that when I first brought the records they were turned over to the United States District Attorney and thereafter turned back to Mr. Johnson; who gave them to Mr. Paster. When I was called on April 15th I was requested to deliver those records to the United States District Attorney or to Mr. Peterson and I was ordered to do that before two o'clock, which I promptly complied with. I had thought that the United States Attorney's office had those records all the time.

Q. Now, there are some other records contained in the Order to Show Cause and in specification No. 2. Now, did you produce such records as you were able to find of those covered in specification No. 2?

A. I produced whatever I was able to find, sir.

Q. Just one question. Did you intentionally or knowingly fail to produce any records that may have been called for by either the subpoena of March 1st or March 25th?

A. No, I did not, sir.

Q. Well, I take it from that statement, then, from your testimony, that it is your position that you have not committed any contempt of this Court?

A. That is correct, sir.

Mr. Graff: For the purpose of this motion, Your Honor, I would like to offer Respondent's Exhibits 5 to 15, inclusive, containing the matters and documents surrendered by this witness. Frankly, I'm not so sure just when they were surrendered but sometime, apparently, on April 1st or thereafter. Now, with respect to Respondent's Exhibits 1, 2, 3 and 4, I should like to offer them only for the purpose of these proceedings. With respect to the rest of the exhibits here, I must respectfully tell the Court that I have not had

time to make any examination of them but apparently they constitute a portion of the records which were impounded by order of this Court. That includes what else is on the table, Your Honor. I have likewise had no opportunity to examine the records which were introduced as evidence in the case, so I am unable to question this witness concerning them. Subject to that offer, you may inquire.

Mr. Dibble: I have no objection to those items going into evidence, Your Honor. I would like to also move at this time that the testimony of Mr. Peterson, the accountant that testified from the findings of the same records which counsel has moved to be introduced, that the transcript of his testimony be made a part of these proceedings and that if there is some way that we can identify these records, that the report show that the records of which we are talking and of which Respondent's Exhibits 1, 2, 3 and 4 are a part are the same records that were brought into court and from which Mr. Peterson testified he received his information.

The Court: Exhibits 1 to 15, inclusive, will be received. (Which said Respondent's Exhibits 1 to 15, so offered and received in evidence, having been previously duly marked for identification, are filed with the record in this case.)

The Court: Do you have any suggestions as to the identification of the balance of the records on counsel's table and which are records impounded by order of the Court?

Mr. Dibble: The only thing that I can see is that we have them retained in the custody of the Marshal now, since they have been made a part of the record here, or part of them have.

The Court: It will be so ordered. The Marshal will retain possession of the impounded records and Exhibits 1 to 15, inclusive, are made exhibits in the present proceeding.

Mr. Dibble: These are part of them, too. We had them over here looking through them. I will put them back on the table.

Mr. Graff: If the Court please, with respect to the offer of counsel to make the testimony of Mr. Peterson a part of this record, we object to it on the ground of hearsay, not having any opportunity to cross examine Mr. Peterson in these proceedings. As a matter of fact, unprepared as I am, I didn't even know that Mr. Peterson testified, much less do I know what he testified to. We certainly object to it on the ground of hearsay.

The Court: What do you have to say to that objection, Mr. Dibble?

Mr. Dibble: I think that it was part of the record of this Court and it was made in the presence of the Court. It constitutes part of the record to establish the importance of the records that Mr. Nilva did not bring in.

The Court: Well, that seems proper to the Court. In fact, it seems to me that in this proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt proceeding arose out of the respondent's action in the case of *United States v. Christianson, et al.*

Mr. Graff: I will most respectfully object on the ground of hearsay to the introduction in this proceeding of any testimony or any exhibits introduced in the criminal case on the ground that they are hearsay and I assume part of it was in the hearing of Mr. Nilva.

The Witness: No, it wasn't.

Mr. Graff: But certainly he had no right of cross examination with respect thereto and certainly is not bound by the proceedings. I think it is attempting to inject in this record something which is obviously inappropriate. There is no right of cross examination at all.

The Witness: Can I intercede, Your Honor? I was not present at any of the testimony of Mr. Peterson and none of his testimony was within my hearing.

Mr. Dibble: This is a proceeding to determine whether the respondent is in contempt of this Court and the thing that is material is the knowledge that the Court has in this proceeding and everything that is material which has come to the Court's attention I think can properly be made a part of this record. The Court would not be in a position to determine whether the contempt had been committed in the presence of the Court if the Court didn't take into consideration the record in the other case where the contempt was committed.

Mr. Graff: Certainly, if that is the position of counsel, it isn't apparent from the Order to Show Cause which was issued by this Court. If I read it correctly—and I think I do—it has three specifications: 1, giving false and evasive testimony on April 1st; 2, disobedience to subpoena No. 78; 3, disobedience to subpoena No. 160. Now, that is the basis upon which we are in court, not the proceedings in the criminal case.

The Court: I think the record in this proceeding ought to disclose the fact that this respondent was an attorney of record for the defendant Paster in the case we have just completed trying. The objection is overruled.

The Witness: Well, Your Honor, if I might intercede here, this is news to me that I was an attorney of record. If I was placed thereon, it was probably, I believe, at the very outset and I think on one of the first motions and I thereafter withdrew and had no part in any of the proceedings whatsoever. I never sat at the counsel table. I never took part in any of the litigation.

Mr. Graff: Mr. Nilva, I am quite sure the Court appreciates that,

The Court: The Court is not suggesting that you were a party of record. Subsequent to the trial of the first case in which Mr. Nilva was a defendant and after that trial in which the jury found him not guilty, Mr. Murphy, I believe

it was, made a motion and asked that Mr. Nilva be made an attorney of record for the defendant Paster. Is my memory correct, Miss McMichael? Is that correct?

The Clerk: That is the way the order reads.

The Court: That is the way the order reads.

The Witness: Yes, I recall that, Your Honor, but immediately thereafter I took no part in any of the proceedings.

The Court: I understand.

The Witness: And withdraw and didn't sit at the counsel table and had no part in any of the proceedings.

The Court: I understand.

The Witness: And was not involved in that capacity whatsoever.

The Court: You may cross examine, Mr. Dibble.

CROSS EXAMINATION

By Mr. Dibble:

Q. Mr. Nilva, when did you first become aware of subpoena No. 78 which is dated — you have a copy of that subpoena in your hand?

A. Yes, sir.

Q. You examine the last page, you will see that the certificate by the United States Marshal's office indicates that it was served on March 1, 1954?

A. Yes, sir. This indicates that the subpoena was served on March 1, 1954, on Walter J. Johnson.

Q. When did you first become aware that this subpoena had been served on Mr. Johnson?

A. I can't state definitely, sir, but it was shortly thereafter, I believe. I can't state definitely.

Q. Did you do anything at that time, shortly after the date of the service of this, to comply with this subpoena?

A. This was March 1st. I can't state that I did anything immediately after the date of this subpoena here. I think

that Mr. Johnson took care of that himself. I recall looking at the subpoena and it appeared to be similar to the subpoena in the first case. I recall that, sir.

Q. Referring to subpoena 160, which you will note on the return that it was served March 25, 1954, on Mr. Johnson, do you recall when that subpoena was served?

A. Well, sir, according to the return here, it was served March 25, 1954, on Walter Johnson, the secretary of the Mayflower.

Q. And how long after the service on Mr. Johnson was it until it was brought to your attention?

A. It was brought to my attention shortly thereafter, sir.

Q. And then did you start to prepare a reply or a response to this subpoena?

A. Well, not a reply. I did make arrangements to check records but immediately thereafter there was a consultation with reference to the preparation of a motion to suppress any of the records requested on the grounds that they were the personal records of Mr. Paster.

Q. I believe you testified in chambers, didn't you, that you had been searching ever since the subpoena had been served?

A. I believe it was shortly thereafter. Now, I won't say.

Q. You started searching for the records named in the subpoena?

A. We did start searching but then this other matter came up.

Q. Well, then the next thing in chronological order was your appearance, I believe, here on April the 1st?

A. No, the next thing in chronological order was the telephone call I received from Mr. Johnson.

Q. But the next time you appeared in court or did anything was on April 1, 1954, wasn't it?

A. That's the next time that I appeared in court.

Q. And that time was the time that you said that up until April the 1st you had been searching for those records, ever since you received the subpoena?

A. Shortly after we received the subpoena, I didn't make a constant search every moment of the day. I think I qualified it there, that I spent a couple hours each day, some afternoons, one evening.

Q. Did you testify at the time we had the hearing that you were working night and day on that?

A. One night, that's right, just one night. I said so this afternoon as well.

Q. And at that time when you appeared on April 1, 1954, you produced what have been marked Respondent's Exhibits 5 through 15, is that right?

A. That's right, sir.

Q. There was a transcript made of that testimony at that time?

A. That's right, sir.

Mr. Dibble: I don't recall, I don't know whether this has been made a part of the record or not.

The Court: You are referring to the testimony of Mr. Nilva on April 1st?

Mr. Dibble: Yes, Your Honor.

The Court: If it is not, it should be a part of the record.

Mr. Graff: I think I asked the Court to make it a part of the record and the Court indicated that it would be.

The Court: I believe you did.

Q. (By Mr. Dibble) Then you did not appear again until April 15, 1954?

A. That is correct, sir.

Q. Now, when you produced these records, Respondent's Exhibits 5 to 15, who did you hand them to? Where were they produced?

A. Now, Mr. Dibble, I turned them over to Mr. Johnson. Mr. Johnson, I believe, turned them over to your office.

Q. Well, actually, Mr. Nilva, didn't you turn them over to Mr. Peterson in Mr. Johnson's presence and then you left?

A. No, I think that was the second time when I was ordered to produce those records at two o'clock. At that time I produced them to Mr. Peterson.

Q. Well, the first time didn't you produce them and give them to Mr. Peterson in Mr. Johnson's presence or give them to Mr. Johnson and tell him to stay with them until Mr. Peterson got through with them?

A. Well, I didn't tell him anything, Mr. Dibble. I turned them over to Mr. Johnson and I presumed that he turned them over to your office. That was the way I thought it was. I may be wrong.

Q. You know now, don't you, that they never left Mr. Johnson's possession, don't you?

A. As a matter of fact, it was a complete surprise to me, because on April 15th, in the Judge's chambers, when I was ordered to produce the records, I didn't even know where they were and Mr. Peterson told me, "Why, they're in Mr. Paster's brown bag."

Q. Where did you find the records on the 15th?

A. On the 15th? Mr. Paster had them in the brown bag that Mr. Peterson referred to and I brought them to court and turned them over as requested.

Q. Now, I believe you testified that you went through the checks and you brought all that had anything to do with the purchase of machines, slot machines, is that true?

A. I brought the checks that—I wouldn't use the words "slot machines" on those; those were consoles.

Q. Did you bring any checks that had to do with the purchase of slot machines?

A. I didn't bring any checks that I could find that had anything to do with slot machines.

Q. What did you do with the checks that you could find that had to do with slot machines?

A. Now, Mr. Dibble, I didn't find anything that had anything to do with slot machines.

Q. You were aware that there were such checks, though, weren't you?

A. I didn't know, sir.

Q. You didn't know?

A. I knew that there were certain checks that you had asked me about in chambers before the Court and I told you the checks that I knew of were in the Appellate Court. They had been introduced in evidence in the trial in St. Paul and those checks as exhibits, naturally, went to the Appellate Court. Those are the only checks I knew of, Mr. Dibble.

Q. You had no knowledge of the check made out to you for the purchase of the machines in Ohio?

A. Now, I know there was a check.

Q. Did you or didn't you? A. Just one moment.

Q. Did you have knowledge of that?

A. I know there was a check made out to me.

Q. Can you answer the question, please?

A. Can I please answer it?

Mr. Graff: Just a moment, if the Court please.

The Court: Answer the question, Mr. Nilva.

Mr. Graff: I suggest that he be permitted to answer the question in his own way.

The Court: He may explain his answer after he answers. You answer the question directly first.

A. Surely, I know now that a check was made out in my name that I endorsed that I received no benefit of that had nothing to do with—I didn't know where that check was and never saw that check. I never saw that check until this afternoon in one of your files.

Q. (By Mr. Dibble) You didn't see it when you endorsed it?

A. Well, I saw it when I endorsed it, certainly, sir, but I had no knowledge what it was for. I just endorsed it. I have endorsed lots of checks.

Q. You didn't know what the check was for?

A. I didn't know what it was for at that time.

Q. Doesn't it say on its face what the check was for?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION.

IN RE ALLAN I. NILVA

Criminal No. 8320.

JUDGMENT AND COMMITMENT.

On the 27th day of April, 1954, at Bismarck, North Dakota, the respondent, Allan I. Nilva, appeared in person and with his attorney, Mr. John W. Graff, of the firm of Hoffmann, Donahue & Graff, of St. Paul, Minnesota, in answer to the Order to Show Cause issued and served on the above named respondent on the 23rd day of April, 1954, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, why said respondent should not be held in criminal contempt for obstructing the administration of justice, and, at the direction of the Court, Mr. Oliver Dibble, Special Assistant to the United States Attorney, appeared on behalf of the Court; and the Court having heard the evidence adduced and the arguments of counsel, and no sufficient cause to the contrary being shown or appearing to the court, the Court finds

THAT Allan I. Nilva gave false and evasive testimony under oath on April 1, 1954, upon answering, as Vice-president of the Mayflower Distributing Company, subpoenas duces tecum directed to the Mayflower Distributing Company in the case of *United States of America v. Elmo T. Christianson and Herman Paster*, Criminal No. 8158;

THAT Allan I. Nilva disobeyed, without adequate excuse, subpoena duces tecum No. 78, directed to the Mayflower Distributing Company, in the case of *United States of America v. Elmo T. Christianson and Herman Paster*, Criminal No. 8158;

THAT Allan I. Nilva disobeyed, without adequate excuse, subpoena duces tecum No. 160 directed to the Mayflower Distributing Company, and disobeyed, without adequate excuse, the order of the Court made on March 29, 1954, directing the Mayflower Distributing Company to produce records forthwith, in the case of *United States of America v. Elmo T. Christianson and Herman Paster*, Criminal No. 8158.

And the Court further finds

THAT, by each of the foregoing acts, Allan I. Nilva obstructed the administration of justice;

WHEREFORE, it is adjudged that Allan I. Nilva is guilty of criminal contempt of the authority of this Court; and it is

ORDERED that Allan I. Nilva is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of One (1) year and One (1) day; and it is further

ORDERED that Allan I. Nilva have a stay of execution for Thirty (30) days, during which the Court will consider his request for probation, and the Probation Officer is hereby ordered to make an investigation and report; and it is further

ORDERED that Allan I. Nilva be released in the custody of his attorney, Mr. John W. Graff.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal, or other qualified officer, and that the copy serve as the commitment of the respondent.

Dated this 27th day of April, A. D. 1954.

CHARLES J. VOGEL,
Judge, United States District Court.

A. I don't know that that was on the face at the time I endorsed it, and that check was not in the cancelled checks that I examined. That was in some other file, Mr. Dibble.

Q. Which you didn't examine?

A. That I couldn't find, that I had no knowledge where it was.

Mr. Dibble: If the Court pleases, I don't believe I have any further questions.

The Court: Yes. The Court finds the defendant guilty of criminal contempt as set forth in the Order to Show Cause insofar as the three specifications therein are concerned, and it specifically finds that the acts of the defendant which constitute criminal contempt did obstruct the administration of justice in the trial of the case of United States of America, plaintiff, against Elmo T. Christianson and Herman Paster. Mr. Nilva, you will stand before the Court.

(The defendant and his counsel come forward and face the Court.)

Allen Nilva, it is the sentence of this Court that you be confined to an institution to be designated by the Attorney General of the United States for a period of one year and one day. Now, not as a part of this sentence at all, the Court is going to order that you never again be allowed to appear as an attorney or counsellor in the United States District Court for the District of North Dakota. What will happen to you in Minnesota, I do not know.

Whereupon, the Court ordered a stay of execution of thirty days.

The testimony of Richard N. Peterson, given on April 12, 1954, in the case of *United States of America v. Elmo T. Christianson and Herman Paster*, Criminal No. 8158, is as follows:

RICHARD N. PETERSON,

being produced, sworn and examined as a witness in behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Dibble:

Q. Will you state your name, please, sir?

A. Richard N. Peterson.

Q. And where do you live, Mr. Peterson?

A. Richfield, Minnesota.

Q. Where are you employed?

A. Federal Bureau of Investigation.

Q. And what is your official capacity with the Bureau?

A. Special Agent.

Q. The Agents of the Federal Bureau of Investigation are generally divided among those who have legal background and those who have accounting background, isn't that true?

A. Yes, sir.

Q. What background did you have?

A. I'm an accountant.

Q. What was your education as far as accounting was concerned before you joined the Bureau?

A. I graduated from the University of Minnesota in 1938 with a Bachelor of Business Administration.

Q. Did you major in a subject?

A. I majored in accounting.

Q. And since being with the Bureau have you received special instructions as to accounting procedures?

A. Yes, sir.

Q. In the investigation of books and records and that type of thing?

A. Yes, sir.

Q. What has been the nature of your work since you have been with the Bureau?

A. Well, I have worked on bank defalcations, frauds against the Government, National Bankruptcy Act Violations.

Q. In other words, work that had to do with accounting a lot?

A. Yes, sir.

Q. And during this period that you have been with the Bureau, have you had occasion from time to time to testify on accounting matters in the Federal and District Courts?

A. Yes, sir.

Q. Did I ask you how long you had been with the Bureau?

A. No, sir.

Q. How long? A. Fifteen years.

Q. Fifteen years. Now, Mr. Peterson, I will ask you to look at this truck here and tell me if you recognize the items that are on this truck?

A. Yes, sir.

Q. What are they?

A. They are books and records of the Mayflower Distributing Company and some of their related companies.

Q. Are they all of the books and records of the Mayflower Distributing Company?

A. No, sir.

Q. Do you know where these records came from?

A. Yes, sir.

Q. Were you present when they were obtained?

A. Yes, sir.

Q. Who obtained them?

A. C. E. Morrison, Chief Deputy Marshal, St. Paul, Minnesota.

Q. Where were they obtained from?

A. Mayflower Distributing Company, St. Paul.

Q. What was the extent of the records that were left there? What capacity did they fill? How many were there?

A. Oh, they have many records left there.

Q. Was there a room full or a building full or an office full?

A. Well, there were several places where they kept their records. Many of these records were down in the basement. There were some in their office upstairs. There were some in the back storage room to the office.

Q. Now, after the Marshal obtained these records of the Mayflower Distributing Company, what did he do with them?

A. He gave them to me.

Q. And did you give him a receipt?

A. I did.

Q. And you acted as the messenger for him to transport those records?

A. Yes, sir.

Q. What did you do with them?

A. Delivered them to Mr. Jonathan Eaton, United States Marshal, at Bismarck.

Q. And they have been in his possession ever since in a room upstairs?

A. Yes, sir.

Q. And during that time you have had occasion to examine them?

A. I have.

Q. When was the first time that you saw these records?

A. Friday, April 2nd.

Q. And at that time, did you have someone assisting you in examining the records? At that time you saw all the records, is that true?

A. Yes, sir.

Q. All the records of the Mayflower that you could find?

A. That's right.

Q. At that time, did you have someone assisting you in examining these records?

A. Yes, sir.

Q. How many? A. Three F.B.I. Agents.

Q. And were they men who had background in accountancy?

A. Yes, sir.

Q. They were working under your supervision?

A. Yes, sir.

Q. How long did you work there at Mayflower looking for these records?

A. Three days.

Q. Now, from that examination that was prepared there or made there under your direction and the examination that you have made since, have you, at my request, prepared certain summaries as to the information that you obtained from those records?

A. Yes, sir.

Q. And did you prepare, at my request, a schedule showing the number of slot machines purchased by the Mayflower Distributing Company during the period November 6, 1950, to April 15, 1951?

A. Yes, sir.

Q. Will you tell us, by examining your schedule that you have prepared, how many slot machines were purchased during the month of November, 1950, starting with the day of November 6th?

Mr. Murphy: Just a moment. May we go up to the bench?

(Whereupon, the following proceedings were had at the bench in the presence of but out of the hearing of the jury.)

Mr. Murphy: This line of questioning is objected to, Your Honor, on the ground that it is evidence which has been taken from the defendant in violation of his Constitutional rights under the Fifth Amendment and that he is required to produce evidence against himself. It is further objected to on the lack of foundation.

The Court: Overruled.

(Whereupon, the following proceedings were had in open court in the presence and hearing of the jury:)

(Whereupon, the following question was read by the reporter:)

"Q. Will you tell us, by examining your schedule that you have prepared, how many slot machines were purchased during the month of November, 1950, starting with the day of November 6th?"

Mr. Murphy: May I ask a couple of questions, Your Honor, for the purpose of making another objection?

The Court: You may do so, Mr. Murphy.

Mr. Murphy: Mr. Peterson, you are about to testify from information you got from the records, is that right?

A. Yes, sir.

Mr. Murphy: And I believe Mr. Dibble asked you to testify as to the number of slot machines. When you refer to a slot machine, what kind of a machine do you have in mind?

A. Well, I have in mind a machine similar to those in back of you and a machine that they formerly called the one-armed bandit, mechanically operated machine that has a drum and a reel.

Mr. Murphy: So that would include the old-fashioned one-armed bandit type and consoles?

A. Right.

Mr. Murphy: Now, would that include machines which did not have automatic pay-outs?

A. No, it would—

Mr. Dibble: (Interrupting) I might interject at this time, the only thing I am asking him to testify is what the records disclose.

Mr. Murphy: Of course, we have no foundation here as to what the record shows. He should know what a slot machine is. If he has definite information from those records as to what a slot machine is, the thing with drums and reels, automatic pay-outs, if he knows that—

The Court: That is a proper subject for cross examination, isn't it, Mr. Murphy, instead of an objection to the testimony itself?

Mr. Murphy: It is the lack of foundation, Your Honor.

The Court: Has he not testified that the information he received is from records that are here in court?

Mr. Murphy: But there is no evidence.

The Court: That is, a schedule of them.

Mr. Murphy: There is no evidence, Your Honor, that the records disclose which of these machines have drums and reels and automatic pay-outs.

The Court: You may inquire as to that on cross examination. You may proceed, Mr. Dibble.

Q. (By Mr. Dibble) I asked you, do the books and records of the Mayflower Distributing Company disclose how many slot machines were purchased during the month of November, 1950, beginning with the 6th?

A. Sixteen.

Q. Now, were you able to determine, by an examination of the record, how many of those were the so-called consoles and how many were the one-armed bandit type machine?

A. There were nine slot machines and seven consoles.

Q. Can you tell us where these machines were purchased from your examination of the records of the Mayflower Distributing Company?

A. Seven were purchased from Dave's Distributing Company in Minneapolis, two from the M and P Sales, Missoula, Montana.

Q. And how about the seven consoles?

A. The seven consoles were bought from Jim Stansfield, Winona, Minnesota.

Mr. Bangs: What place did you say?

A. Winona, Minnesota.

Q. (By Mr. Dibble) How many machines, both consoles and slot machines, were purchased by the Mayflower Distributing Company during the month of December, 1950?

A. 94.

Q. And how many of those 94 were consoles?

A. 29.

Q. Can you tell us where those 29 consoles were purchased?

A. Two from Babe Carnero, Des Moines, Iowa; two from the Mayflower Distributing Company in Omaha; and 25 from Bally Manufacturing Company, Chicago.

Q. And of the 65 slot machines, the one-armed bandits, can you tell us where they were purchased?

Mr. Murphy: That is objected to, Your Honor, as incompetent, irrelevant and immaterial, as to where they were purchased.

The Court: Why is it material, Mr. Dibble, the place of purchase?

Mr. Dibble: To show a plan, scheme, design, to show intent on the conspiracy.

The Court: The fact that he purchased them, isn't that sufficient? As to where he purchased them, why is that material?

Mr. Dibble: I will withdraw that question as to November, Your Honor.

The Court: Very well.

Q. (By Mr. Dibble) Do the records show the purchase of machines during the month of January, 1951?

A. Yes, sir.

Q. How many, consoles and slots? A. 81.

Q. And how many of those were consoles? A. 15.

Q. Will you tell us where those 15 consoles were purchased?

Mr. Murphy: That is objected to, Your Honor, as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Dibble: May we approach the bench, Your Honor?

(Whereupon, the following proceedings were had at the bench in the presence of but out of the hearing of the jury:)

Mr. Dibble: I expect to elicit as an answer to that question that three of these were purchased in the State of Minnesota but that eleven of them were purchased in the State of California and that one came from Chicago.

The Court: Maybe we had better go in chambers.

Mr. Dibble: I am almost through, and that because of the date I think it is important to show intent, and if he is showing—if he is buying machines outside of the state, it shows an intent, it shows knowledge.

The Court: Well, you are trying to show similar acts?

Mr. Dibble: Yes, Your Honor.

The Court: By the defendant, and as I stated the first day of the trial here on those motions, I was going to allow you to show the stockpiling of machines but not show similar violations. It seems to me as though that is what you are attempting to do now.

Mr. Dibble: Yes, but the rule is, when we are showing similar offenses, even though it constitutes a violation of the law, they are admissible.

The Court: If it is an essential part of the scheme, yes, but here it is not necessary to show it, is it?

Mr. Dibble: It is essential to show intent. I think that certainly shows intent, Your Honor. It shows knowledge. It shows the plan, scheme and design.

The Court: The objection is sustained.

(Whereupon, the following proceedings were had in open court in the presence and hearing of the jury:)

Mr. Dibble: Your Honor, I would like to ask for a few minutes' recess so that we may examine the law on that point, and may we have a conference in chambers?

The Court: Very well. We will take a short recess and you gentlemen join me in chambers.

(Whereupon, a short recess was taken by the Court, during which the following proceedings were had in chambers out of the presence and hearing of the jury:)

Mr. Dibble: Shall I proceed?

The Court: You may proceed.

Mr. Dibble: If the Court pleases, we now offer as a basis for the question which I asked, to show the purchase of machines outside of the state in January of 1951, outside of the State of Minnesota in which the defendant Paster was doing business. We expect to show the purchase of machines from California and Chicago and Omaha, Iowa. We expect to show that during February there were seven slot machines bought in Iowa. We expect to show, on the same line of the same reasoning, the sales of these machines and where they were sold. We think it is admissible, pertinent, desirable and relevant and, of course, we feel that the law is on our side, too, because the conspiracy, as set forth under Section 371 requires a specific intent, and I think the law is well established that where a specific intent is required; that like offenses and like conduct, something that even though it's not an offense, may be shown and things that even though they constitute an offense may be shown; and the reason they are shown is to show either a scheme, a design or pattern similar to the one with which the defendant is charged so as to impute to the defendant the intent or the knowledge which is required by the statute.

Of course, I think the cases also hold that if, in showing those circumstances for the purpose of showing the specific intent required, if it also indicates that a substantive offense

has been committed other than that one charged, that where your statute requires a specific intent, then you are permitted to do that. Of course, I readily agree that if a specific intent is not required, then they are not admissible. But I submit under the law, under the cases, where specific intent is required that these acts which we have made a proffer on are admissible.

The Court: Where you have been allowed to show a stockpiling of the prohibited machines in Minnesota, why should you be allowed to go further and show that they were acquired after the effective date of the Johnson Act through transporting them across state lines? Why is that essential to your intent?

Mr. Dibble: I think it is another element of intent. It shows the intent more strongly than if they had purchased them all in Minnesota. Here is a defendant that is not only purchasing machines within the law, within the state, but he is going even further, he is going outside of the state to purchase machines.

The Court: What is the position of the defendants?

Mr. Murphy: Well, our position, Your Honor, is that evidence is outside of the scope of the issues in this case. Now, it is true that sometimes you can show a similar offense, where a witness happens to be testifying and something in the testimony, in connection with which he is testifying, brings out other facts relating to another offense; but here we have an attempt to bring out affirmative proof of separate offenses which have no bearing on the issues in this case, whatever.

This case involves a conspiracy to violate the Anti-Gambling Act by making a haven for gambling in the State of North Dakota, and it charges a conspiracy between an official of the State of North Dakota, certain operators in the State of North Dakota and others to violate this law in the State of North Dakota.

Now, if they are permitted, Your Honor, to bring in evidence of any number of other shipments from other states into St. Paul to show where they come from, it's going to be prejudicial and put the defendants at a disadvantage that they cannot recover from, because it's going to make a separate case and a separate trial out of each shipment that comes into Minnesota. We are in a position to defend this case. We will have to explain and bring in evidence as to each one of these shipments that they claim came into Minnesota. So we say, Your Honor, that it would be an abuse of discretion, it would be prejudicial and unfair to put the defendant in that position.

The Court: It does tend to establish motive or intent, does it not?

Mr. Murphy: Well, you've got to think of this, Your Honor: Here is a corporation which is doing business; the corporation is not indicted. Mr. Paster, it is true, is the sole owner of the corporation. It is true that some of his employees may have exercised their discretion and judgment and bought machines outside of the state. If this was a personal matter that he was doing himself, like in the ordinary offense that a person commits, the elements of it could be all attributed to him.

The Court: Aren't you getting slightly inconsistent when you say that he is the sole owner of Mayflower and therefore the Government should not be allowed to produce his records, and then on the other hand stating that this may have been done by his employees without his knowledge, or that is the inference?

Mr. Murphy: Well, of course, the Government has taken the position and the Court has taken the position that it is a corporation and apparently his books are not his personal property, and I'm afraid the Government isn't being consistent here. At any rate, these are the books of the corporation and the Government is having its way about that.

They are producing the books of the corporation. If it is an offense, it's an offense of the corporation. That's what I am trying to say.

The Court: Which corporation he owned and controlled.

Mr. Murphy: Yes.

Mr. Strutz: So far as the defendant Christianson is concerned, this certainly would be highly prejudicial and improper unless there is some showing that some of these machines that were purchased, say, in some of these other states were intended to be brought into North Dakota. How could that be binding on the defendant Christianson, going out into Iowa or wherever these machines were purchased and bought, some of these slot machines? There is no evidence here, Judge, that any real slot machines were ever intended to be brought into North Dakota. It would prejudice the jury and be highly improper so far as the defendant Christianson is concerned.

The Court: I am reading from *Woodman v. United States*, Fifth Circuit, 30 F. 2d 482, at page 484: "Evidence tending to prove any violation of the National Prohibition Act by any of the conspirators connected with the conspiracy, whether alleged as an overt act or not, was relevant and admissible to prove the intent and common purpose of the alleged conspirators."

Then again from *United States v. Crowe*, Seventh Circuit, 188 F. 2d 209, at page 212: "Evidence of another crime is admissible where the other offense is logically connected with that charged, or where the acts are so closely and inextricably mixed up with the history of the guilty act itself as to form part of the plan or system of criminal action."

I am wondering if this situation fits that rule.

Mr. Strutz: I don't believe it does because there is nothing here to show that they ever agreed to bring any slot

machines into North Dakota except these consoles. It certainly would be highly prejudicial.

Mr. Murphy: Well, it is our contention, Your Honor, that any transaction from a different state is entirely outside of the scope of the issues of this case. I don't know how we could defend against it, Your Honor. We'd have to get witnesses as to each of these shipments coming into Minnesota and explain the circumstances of it.

The Court: If the only way of showing the stockpiling was showing that they were transported across state lines, I wouldn't have very much difficulty; but as I stated at the beginning of the trial, I thought it was competent for the Government to establish the stockpiling of the prohibited machines but I was very doubtful about the admissibility of their having been transported across state lines. Now, you have been able, by the records of the corporation, to show the stockpiling and I am somewhat dubious about allowing you to show that in the stockpiling they did violate the law in other respects through transporting from California, Iowa, Illinois, and so forth. Why is it necessary?

Mr. Dibble: I think it is highly material. It is certainly evidence for the jury to consider as to Mr. Christianson; if he is a part of the conspiracy, of course, anything that was done in furtherance of the conspiracy is chargeable to him, too. On the intent, the specific intent required, it's quite a burden upon the Government in a conspiracy to show that intent unless you can bring in all the circumstances showing the purchase of machines and where they came from. It would certainly be a much stronger indication of intent if Mr. Paster was going outside of the state to buy these machines than it would if he was buying them in the state. If he was buying them in the state, maybe he was going to use them to distribute in the state.

Of course, we expect to show that later he shipped some of them out of the state. We expect to show where he sold

these machines, and not only in North Dakota but in other states. It certainly shows the intent in his mind and what he intended to do and what his purpose was in this conspiracy.

I think when Mr. Murphy says that they'd have to bring witnesses, of course, that is a matter of defense. If he can bring witnesses to alleviate this thing or act as a defense to it, why, then that's up to him, but I don't see how he can. To start with, we are talking about what the records of the Mayflower show, that they purchased them at these different places. The records don't show that Joe Blow down in Mississippi brought the machines up to him and sold them at Mayflower in Minneapolis. It shows that he went out and got them, or his corporation went out and got them or his employees went out and got them.

Mr. Murphy: Of course, I don't think, Mr. Dibble, the records substantiate any of the facts of how those machines were bought. All they show is that they were bought from somebody else in a different state.

The Court: What about that? Is that what the records show, Mr. Dibble?

Mr. Dibble: The records show that they were bought from somebody in another state, yes, sir.

The Court: And they do not disclose who transported them nor when?

Mr. Dibble: I think I would have to ask my accountant about that, who and when. Of course, I mean the records speak for themselves. If they have got something that's contrary to the record, why, then that's a different proposition, that's their defense. I mean, all we can go by is the records. These are the records of the defendant or the defendant's corporation.

The Court: Of course, you gentlemen have known that the question was coming up since the day before we drew the jury. Do you have any citations for me?

Mr. Murphy: I haven't any right here, Your Honor. There are so many authorities on that. It's all largely within the discretion of the Court, as I understand the rule. It is permitted to show other offenses at times where the person, the defendant, who is charged with an offense has himself personally been committing offenses of the same nature. Now, you've got a situation here, Your Honor, where this particular defendant is head of a big organization. There is no foundation that he is personally responsible for any of these shipments that have come into Minnesota, as indicated by these records. It is imputing to him something that there is no foundation to impute to him, and it is putting him at a disadvantage in requiring him to defend for what may be some employee or agent who was not authorized to do it and who has committed an offense or a violation of this law; it is charging him with responsibility for what the agent did without proper authorization. Now, there is no foundation for that, Your Honor. Then in addition to that, it's so far beyond the scope of the issues in this case.

The Court: Why is it far beyond the scope of the issues?

Mr. Murphy: Well, this indictment, Your Honor, charges a conspiracy to violate the Anti-Gambling Law by shipping machines into the State of North Dakota. It doesn't say other places, shipping machines into the State of North Dakota by making a haven for gamblers in the State of North Dakota. The whole issue, as it is framed by the indictment, is limited to the State of North Dakota.

The Court: Even if that is correct, the stockpiling of machines through getting them from other states would tend to show an intent, probably, on the part of the defendants to transport such stockpiled machines into the State of North Dakota.

Mr. Murphy: Well, I think probably the position Your Honor is taking on it is that they could show that they had acquired machines, show that they had them on hand, but to show additional offenses of shipment in interstate commerce from other states, that's a different thing and another thing, Your Honor. This defendant has been tried on that conspiracy in Minnesota and you have to consider the former jeopardy situation of this, and the period of these conspiracies overlaps and he's already been charged with a conspiracy and apparently counsel intends to include in this case here the same evidence that was used in the Minnesota case.

The Court: For the sole purpose of showing intent, if I understand counsel.

Mr. Murphy: But if he uses an element of the case, Your Honor, that was used to prove the case in Minnesota, an important element of it, to substantiate the case here. It is nevertheless former jeopardy.

Mr. Dibble: I can't see that at all, Your Honor. An acquittal in that case down there certainly wouldn't bar prosecution in this case. There is just no application of the rule of double jeopardy here at all. As to his statement about the unauthorized persons making these purchases, he can probably argue that and he may be able to put on some defense to that effect. When you show the quantity we are showing, you can't say that the sole owner or the person that ran this corporation, the fellow that had his fingers in all of it, you certainly can't say that he was ignorant of all of these purchases. I feel awfully strongly that the law is definitely in our favor and Mr. Murphy is making a good argument but I don't think he is getting anywhere as far as the law is concerned.

Mr. Murphy: I can show Your Honor two Eighth Circuit cases to the effect that where you take an important element of one case on which a defendant has been tried and either

convicted or acquitted, and then you use that in another case to try to convict him on another proposition, it is former jeopardy. Now, that is what our Eighth Circuit has held in two cases.

The Court: Even where it is introduced solely for the purpose of establishing intent in a conspiracy case?

Mr. Murphy: I don't think either of them was a conspiracy case. I think they were both narcotic cases.

Mr. Dibble: That is an entirely separate offense that we are proving here and the laws hold that even though they bring in evidence of an entirely distinct offense, that it is still admissible to show intent.

Mr. Murphy: But I think that in a conspiracy case the attitude of the Court should be to exercise greater restraint because of all the hazards that a defendant in a conspiracy case must face because of the rules of evidence; and certainly it ought to be limited, Your Honor, to the charges laid in the indictment.

The Court: Well, gentlemen, I want to look these cases over and if you have anything more give them to me. If you haven't anything more to give me, I will rule on it shortly.

Mr. Bangs: When you are looking this up, are you going to consider our separate objection on behalf of the defendant Christianson, too?

The Court: The record discloses an objection on behalf of the defendant Christianson, does it not?

Mr. Bangs: The objection made in here in this room right now.

The Court: I don't know whether you did make an objection to the Government's offer of proof.

Mr. Bangs: Well, the only objection that I know of that was specific as to the defendant Christianson was made in this room during this conference by Mr. Strutz.

Mr. Strutz: That wasn't up at the bench. I don't know what you did up there.

Mr. Bangs: I made no statement up there.

The Court: Well, the record does now disclose that you object on behalf of the defendant Christianson. I believe you had an understanding also that all objections would apply equally to the two defendants unless you indicated to the contrary.

Mr. Bangs: That is correct, but what I am getting at is, we had this added objection that this particular offer of proof was objectionable on behalf of the defendant Christianson for the reason that it had no application to him, even though he is charged as a co-conspirator. These are acts of Mr. Paster, apparently involving machines, purchases and shipments maybe of machines from other states but not into North Dakota.

The Court: But into Minnesota, and if a conspiracy has been or will be established and he was one of the conspirators, the fact that one of them purchased machines from Iowa and California and so forth would be chargeable to him, too, would it not?

Mr. Bangs: Mr. Dibble has gone on to say that he also intends to show that there were shipments by Paster to states other than North Dakota and I think my thought is directed also to that, that why should the defendant Christianson be implicated in any way with Mr. Paster's sales or transportation of machines to Iowa or Minnesota or to Illinois or to any other state?

The Court: Mr. Dibble, your offer of proof didn't include that but I believe you did make the statement subsequently?

Mr. Dibble: Yes, sir, we intend to go into that. We intend to show where these machines were sold, wherever they were sold, and, of course, the act of one conspirator is chargeable to the other.

Mr. Strutz: Not if it's not in furtherance of the conspiracy it isn't.

Mr. Dibble: Well, the fact that the machines were sold, say, in Philadelphia—I think we expect to show that—the fact that that was part of Mr. Paster's activities and part of the thought in his mind, the intent in Mr. Paster's mind is attributable to anybody in the conspiracy to show the intent of the conspiracy, what the conspiracy was formed to do.

Mr. Bangs: That's one point we are making. There is nothing in the indictment that charges Mr. Christianson with being in any kind of a conspiracy to sell or transport machines to Philadelphia or Illinois or any place else. It was confined to North Dakota so we certainly object to this evidence on the grounds it doesn't apply to the defendant Christianson, if it relates to transactions from Minnesota into states other than North Dakota.

The Court: Very well, gentlemen, I will rule shortly.

(Whereupon, a short recess was taken by the Court, after which the following further proceedings were had in chambers out of the presence and hearing of the jury:)

The Court: Gentlemen, the objections to the Government's offer of proof as to where these machines were purchased from will be overruled. The Government will be allowed to show where machines purchased in January and February came from. As to the Government's second offer of proof—if it can be considered that—that the Mayflower Distributing Company sold machines after the effective date of the Johnson Act in Pennsylvania and other states, the objections will be sustained. You will not be allowed to show that the Mayflower Distributing Company sold machines in any other state excepting North Dakota: I guess that is clear.

(Whereupon, the following proceedings were had in the court room in the presence and hearing of the jury:)

Q. (By Mr. Dibble) Now, Mr. Peterson, I believe when we recessed you had testified that the Mayflower Distributing Company, during the month of January, 1951, purchased 81 slot machines, 15 of which were consoles and 66 of which were the one-armed bandit type, is that correct?

A. 66 were slots and 15 were consoles.

Q. Now, will you tell us where they purchased the 15 consoles?

A. Three from Jim Stansfield, Winona.

Q. Winona?

A. Minnesota. 11 from the Golden Gate Novelty, San Francisco.

Q. California?

A. Yes. One from the Bally Manufacturing Company of Chicago.

Q. Do the records reflect where the Mayflower Distributing Company purchased the 66 one-armed bandit type slot machines?

A. 15 from Dave's Distributing Company, Minneapolis; four from Mayflower at Omaha.

Q. Will you give us the states, too, please, sir, for the record?

A. Omaha, Nebraska; 19 from Don Hall of Jackson, Minnesota; 11 were purchased from Sam Nilva, it was marked "Iowa V.F.W."; 17 were purchased from the Naval Air Station, Minneapolis.

Q. Do the records reflect how many slot machines were purchased by the Mayflower Distributing Company during the month of February, 1951?

A. Seven.

Q. Were those all one-armed bandit types or consoles?

A. They were slot machines.

Q. Where were they purchased?

A. Charles City, Iowa, Sam Nilva, S. Nilva.

Q. Did you also make an examination of the records of the Mayflower Distributing Company to determine what slot machines, both console and one-armed bandits, were sold during the period of November 6, 1950, to April 15, 1951?

A. Yes.

Q. Can you tell us how many machines were sold during the month of November starting with the 6th, November, 1950?

A. 17.

Q. And how many of those were slots and how many consoles?

A. 8 slots and 9 consoles.

Q. During the month of December, 1950?

A. 98 slots and 180 consoles.

Mr. Murphy: What was the last number?

A. 180.

Q. (By Mr. Dibble) During the month of January, 1951?

A. 449 slots and 77 consoles.

Mr. Dibble: Now, I'm going to have to lead him a little to conform to Your Honor's ruling.

The Court: Very well.

Q. (By Mr. Dibble) Do the records show any sales during the month of January, 1951, to Mr. Stanley Baeder?

A. Four Triple Bells.

Q. Do the records show the sale of any consoles or slot machines to Mr. Emil Christianson during the month of January, 1951?

A. 43.

Q. Were those consoles or slot machines?

A. Consoles.

Q. Do the records indicate any sales to Mr. Sande during the month of January, 1951?

A. Two.

Q. Do the records indicate the date of the sale to Mr. Baeder?

A. Yes.

Q. What was that date? A. January 22nd.

Q. 1951? A. 1951.

Q. And do the records indicate the date of the sale of the 43 consoles to Mr. Emil Christianson?

A. Yes.

Q. What date? A. January 25, 1951.

Q. And do the records indicate the sale of the three consoles to Mr. Sande?

A. Yes.

Q. What does the record indicate?

A. One on January 11, 1951, two on January 12, 1951.

Q. Do the records indicate where Mr. Emil Christianson was from?

A. No, they don't. They reflect it as a cash sale.

Q. And were you able to determine if there were any shipments made to Williston, North Dakota, at or about that time?

A. There was a payment to the Gepner Trucking Company on February 1st for a trip to Williston.

Q. And did your examination of the records disclose a shipment of any other type of machines to Williston, North Dakota, during the month of January?

A. No.

Q. Can you produce for us without too much trouble the Gepner check that you referred to? (Witness complies.)

(A document, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 104, BG".)

Q. I show you Government's Exhibit 104 and ask you if that is the check to which you just referred?

A. Yes.

Q. And you have just taken that from the books and records of the Mayflower Distributing Company which were produced here?

A. Yes, sir.

Mr. Dibble: If the Court pleases, I offer Government's Exhibit 104.

Mr. Strutz: Could we see it?

(Said exhibit handed to counsel for the defendants.)

Mr. Dibble: If the Court pleases, I offer Government's Exhibit 104.

The Court: Exhibit 104 will be received.

Mr. Murphy: That is subject to the same objection, Your Honor.

The Court: The record will so indicate, Mr. Murphy.

(Which said Plaintiff's Exhibit 104, so offered and received in evidence, having been previously duly marked for identification, is filed with the record in this case.)

Mr. Dibble: Exhibit 104 is a check of the Mayflower Distributing Company dated February 1, 1951, payable to the order of A. Gepner in the amount of \$210.00, drawn on the Midway National Bank, St. Paul, Minnesota, and the notation "for trip to Williston, North Dakota," signed by Mr. Engel, I believe, and countersigned by Mr. Johnson for the Mayflower Distributing Company. It is endorsed by the A. Gepner Trucking Company by Mr. A. Gepner.

(Plaintiff's Exhibit 104 handed to the jury.)

Q. (By Mr. Dibble) Now, Mr. Peterson, do the records reflect the sale of any slot machines or consoles during the month of February, 1951? You can answer that "yes" or "no".

A. Yes, sir.

Q. How many? A. One.

Q. Can you tell us from your examination of the books and records of the Mayflower Distributing Company the value of the machines as reflected by their books, the value of the machines sold during the month of November, the value of the slot machines?

A. Yes.

Q. How much? A. \$625.00.

Q. And can you tell us the value of the consoles sold during the month of November?

A. No.

Q. Why weren't you able to determine that?

A. Well, not without a detailed audit of all their transactions. I haven't made that.

Q. And was there a difference in the way they carried their consoles—was that different from the way they carried the slot machines?

A. Yes.

Q. How was it different?

A. Well, slot machines were entered into a separate page in their ledger and consoles were carried with other machines.

Q. Can you tell us the value of the sales of the machines during the month of December, 1950?

Mr. Murphy: Would you be more specific as to what machines?

Q. (By Mr. Dibble) The slot machines, the one-armed bandits.

A. \$17,735.00.

Q. And were you able to tell the value of the consoles during the month of December?

A. No.

Q. For the month of January were you able to determine the value of the slot machines?

A. Yes, sir.

Q. How much? A. \$59,005.00.

Q. Were all of these machines new machines? A. No.

Q. Can you tell us the value of the new machines?

A. Yes, sir.

Q. How much?

A. In December, the value, the sales—

Q. (Interrupting) Or January?

A. In January? \$9,000.00.

Q. What was the value of the used machines in the month of January?

A. \$50,005.00.

Q. Could you determine the value of the consoles?

A. No, sir, I haven't yet.

Q. Now, were the records that you found at the Mayflower Distributing Company complete?

A. Well, I didn't have a chance to make a list of every record in the Mayflower Distributing Company. I wouldn't be able to answer that question.

Q. The record that you examined, do they appear to be complete?

A. Well, there are several items missing that I noticed.

Q. And what are some of the items that are missing?

A. Well, there's the sales invoices to Stanley Baeder on January 22nd and two sales invoices to Robert Sande in January, on January 11th and 12th, and then there's a group of invoices for the end of January to the General Coin Machine Company of Philadelphia that are not there and I wasn't able to find any ledger sheet on Robert Sande or Stanley Baeder.

Q. How were you able to determine that these invoices were missing?

A. Well, there's a charge-out or a notation in the file that the invoice on Stanley Baeder was taken out and the same for Sande. There's no explanation for the invoices missing to the General Coin Machine Company.

Q. Have you examined the records that were produced by the Mayflower Distributing Company at the last trial?

A. Yes, sir.

Q. And did you examine the exhibits that were produced by the Mayflower Distributing Company at this trial upstairs by Mr. Nilva and Mr. Johnson?

A. Yes, sir.

Q. And were these records which you say are missing—were any of those records in those exhibits?

A. No, sir—on second thought, in the records I examined from the last trial, there was a ledger sheet for Stanley Baeder and there was a record of a ledger sheet for Robert Sande.

Q. I believe the record sheet for Robert Sande was produced after the last trial, wasn't it?

A. I don't know when it was produced.

Q. You didn't testify at the last trial? A. No, sir.

Q. I show you a Government's exhibit which has been marked for identification with the number 52 and ask you if that is the record of Mr. Baeder to which you referred.

A. It is.

Q. And are you able to tell us, from your examination of the books and records of the Mayflower Distributing Company, if that record is accurate?

A. It omits the one item, the sale in January, January 22, 1951, of four Triple Bells for \$1100.00.

Q. And how is that \$1100.00 accounted for in the credit and debit or in the balance account, credits and debits and balance?

A. Well, this record would indicate that Mayflower owed Stanley Baeder \$1100.00.

Mr. Dibble: I believe you have seen this before. I offer Government's Exhibit 52. Do you want to see it again?

The Court: I don't believe it has been offered, Exhibit 52.

Mr. Murphy: The same objection, Your Honor.

The Court: Overruled. Exhibit 52 will be received.

(Which said Plaintiff's Exhibit 52, so offered and received in evidence, having been previously duly marked for identification, is filed with the record in this case.)

Q. (By Mr. Dibble) The red item indicates that?

A. It indicates that Mayflower owed Stanley Baeder \$1100.00.

Q. And according to your examination, the balance at that time should have been zero, is that right?

A. Right.

Q. I show you what has been marked with the number 94 for the purposes of identification and ask you if that is the ledger sheet that you examined here for Mr. Sande.

A. Yes.

Q. I believe you testified there was no ledger sheet for Mr. Sande in the Mayflower books and records, is that right?

A. I could find no ledger sheet for Mr. Sande.

Mr. Dibble: If the Court pleases, I offer Exhibit 94.

Mr. Murphy: The same objection, Your Honor.

The Court: Overruled. 94 may be received.

(Which said Plaintiff's Exhibit 94, so offered and received in evidence, having been previously duly marked for identification, is filed with the record in this case.)

Q. (By Mr. Dibble) Will you tell us, Mr. Peterson, if your examination of the books and records of the Mayflower Distributing Company reflected that that ledger sheet—is that a ledger sheet?

A. Yes, sir.

Q. (Continuing) —that that ledger sheet is accurate?

A. No, it isn't accurate.

Q. Why is it not accurate?

A. It doesn't show the sales to Mr. Sande in January.

Q. I believe you testified that that was three consoles, or something?

A. Yes, sir.

Mr. Dibble: Will Your Honor indulge me just a moment?

The Court: Yes, indeed, take your time, Mr. Dibble.

Mr. Dibble: You may inquire.

CROSS EXAMINATION

By Mr. Murphy:

Q. Mr. Peterson, in connection with the Christianson transaction, I think you said Emil Christianson, there is something in the books that shows a negotiation with Emil Christianson?

A. Yes.

Q. And I think you testified that that reflected a transaction of 43 consoles in January of 1951?

A. Yes.

Q. Do you know whether or not there was any transportation of those consoles to Mr. Christianson?

A. No.

Q. Do you know whether or not as a matter of fact Mr. Christianson bought those consoles from Mr. Sande?

A. No, these were not bought from Mr. Sande. They were bought from Mayflower.

Q. Do you know whether or not there was any transaction whereby Mr. Christianson took over the obligation that Mr. Sande had to the Mayflower Company?

A. Yes.

Q. Well, did that have relation to these 43 consoles?

A. No.

Q. So then it is your testimony that there was a sale of 43 consoles in January to Mr. Christianson?

A. Yes, sir.

Q. And that those consoles were transported to Mr. Christianson by the Gepner Truck Company?

A. I can't positively say that Gepner transported those machines. I only noted the close proximity of the payment to Gepner for a trip to Williston and the sale of the machines to Christianson.

Q. You just sort of tied those two up together?

A. That's right.

Q. And do you know whether or not Mr. Christianson—if he bought those from the Mayflower he may have come to St. Paul and picked them up himself?

A. He may have.

Q. Do you know or do the records show when he took possession of those machines?

A. No.

Q. Does it frequently happen, Mr. Peterson, that in accounting and bookkeeping methods that merchandise may be sent out one month and then the billing for it made the following month?

A. That could happen.

Q. That happens frequently, doesn't it?

Mr. Strutz: If the Court please, might we have an understanding here that Emil Christianson and Elmo Christianson are not one and the same person?

The Court: Well, I am sure that that is clear.

Mr. Strutz: I was afraid there might be some feeling that maybe Elmo and Emil were the same person.

Q. (By Mr. Murphy) Mr. Peterson, you said that in January your records or your summary showed that there were 59,000 slots sold by Mayflower?

A. That's the dollar volume.

Q. \$59,000.00? \$59,000.00 worth? A. Yes.

Q. And that \$59,000.00 worth, that would be consoles, would it, or the old-fashioned one-armed bandits? Are you putting them together or separating them?

A. It's just slot machines. It does not include consoles.

Q. That doesn't include consoles? A. No.

Q. Now, you say that you cannot tell from the records the exact amount of the consoles that they sold?

A. Well, I could if I had the time. I could go through each transaction and pick them out.

Q. They sell a number of different articles, don't they, Mr. Peterson?

A. Yes, they do.

Q. They sell bowling games? A. Yes, sir.

Q. And ice machines and music boxes and all kinds of coin-operated machines?

A. They sell all kinds of coin-operated machines, yes, sir.

Q. Now, I think, Mr. Peterson, that you have testified with reference to the Stanley Baeder account it is incorrect in that four of those machines were left out?

A. That's right.

Q. And the balance of \$1100.00 represents the same amount as the four machines, is that right?

A. Yes, sir.

Q. Now, with reference to the Stanley—to the Sande account sheet, you state that that is not correct for the reason that it is not complete, is that right?

A. That's right.

Q. It's correct as far as it goes but it doesn't go far enough, is that right?

A. Yes, sir. There's no transaction for January.

Q. They didn't carry it into January? A. That's right.

Q. Now, those consoles that you are talking about that Mr. Sande got in January, do you refer to the Evans Racers and the Bangtails and so forth that are included in that?

A. There were three Evans Racers.

Q. Three Evans Racers and those are the machines without drums and reels?

A. I don't know.

Q. You don't know about that? A. No.

Mr. Murphy: I believe that is all, Mr. Peterson.

Mr. Strutz: I have no cross examination.

REDIRECT EXAMINATION

By Mr. Dibble:

Q. Mr. Peterson, Mr. Murphy asked you in regard to the shipment to Williston, or that sale, if it wasn't common practice to bill it one month later. Did you base your information and testimony that you gave on a bill?

A. No, not entirely. I based my testimony on the shipping records of Mayflower showing that those 43 machines went out on January 25th.

Q. Was there also an invoice? A. Yes, same date.

Q. Mr. Murphy also made some reference to bowling games and other kinds of games. How were you able to determine which were slot machines and which were consoles?

A. Well, from the inventory records and I also examined a report that Mayflower sent in to the Attorney General in which they described machines as slot machines and consoles

and registering under Public Law No. 906, and I examined certain credit memoranda and receiving department memoranda that describe these machines as slots or consoles.

Q. Now, these machines that you testified that were sold to Mr. Christianson, were you able to determine if some of these machines arrived at the Mayflower Distributing Company after January 2nd?

A. Yes, sir.

Q. How many machines arrived after January 2nd that you were able to determine?

Mr. Murphy: That is objected to, Your Honor, as improper redirect and for the further reason that it is repetition. It wasn't covered on cross examination.

The Court: The main objection is that it is improper redirect examination?

Mr. Murphy: That's right.

The Court: That is true, isn't it, Mr. Dibble?

Mr. Dibble: Well, I think Mr. Murphy, on cross examination, raised the question of when they were actually shipped and he asked could he tell when they were actually shipped. Of course, if those machines arrived at Mayflower after January the 2nd, they would have to be shipped after that date.

Mr. Murphy: I think he merely testified that the machines went out January 25th. That was all that was covered on that point.

The Court: Will you read the question, Miss Good? I don't think I am quite clear as to what is called for.

(Last question read.)

The Court: Are you referring to machines received by Mayflower?

Mr. Dibble: Yes, Your Honor.

The Court: That wasn't gone into on cross examination, was it?

Mr. Dibble: Well, I will ask Your Honor to grant me permission to ask that question now as a part of the direct examination which was inadvertently left out.

The Court: Very well, you may do so.

Q. (By Mr. Dibble) Will you tell us how many of the machines that went to Mr. Christianson that arrived at the Mayflower Distributing Company after January 2nd?

A. Three.

The Court: At this time Court will be in recess until two o'clock this afternoon.

Whereupon, the Court stood at recess until two o'clock p.m. of said Monday, April 12, 1954.

Afternoon Session, Monday, April 12, 1954

Pursuant to adjournment as aforesaid, at two o'clock p.m. of said Monday, April 12, 1954, the Court met, present and presiding as before, and the trial continued as follows:

RICHARD N. PETERSON,

resumed the stand, having been previously duly sworn, and testified further as follows:

REDIRECT EXAMINATION

(Continued).

By Mr. Dibble:

Q. Mr. Peterson, I believe that when we recessed at lunch time you had just told us that there were three machines—that of the machines that were sold to Mr. Christianson, three of them were delivered at Mayflower Distributing Company in St. Paul after January 2, 1951. Can you tell us what kind of machines those three machines were?

A. Yes, sir.

Q. What were they?

A. They were consoles, Keeney Three-Ways.

Q. And can you tell us when they were received by the Mayflower Distributing Company?

A. January 18th.

Q. 1951? A. 1951.

Q. Where did they come from?

A. Golden Gate Novelty Company.

Q. Where is that? A. San Francisco, California.

Mr. Dibble: You may inquire.

RE CROSS EXAMINATION

By Mr. Strutz:

Q. Mr. Peterson, you testified on redirect as to some report sent in by the Mayflower to the Attorney General, do you recall that?

A. Yes, sir.

Q. Was that the Attorney General of the United States that you were referring to?

A. That was, sir.

Mr. Strutz: That is all, thank you.

Mr. Dibble: You may step down.

(Witness excused.)

In the United States District Court for the
District of North Dakota
Southwestern Division

Cr. No. 8320

United States of America

vs.

Allen I. Nilva

NOTICE OF APPEAL

1. *Name and Address of Appellant*

Allen I. Nilva
1830 Hillcrest Avenue
Saint Paul, Minnesota

2. *Names and Address of Appellant's Attorneys*

John W. Graff
Hoffmann, Donahue & Graff
1220 Minnesota Building
Saint Paul 1, Minnesota

3. *General Statement of Offense Charged*

Criminal contempt of Court for giving false and evasive testimony under oath and disobedience to two subpoenas duces tecum.

4. *Concise Statement of Judgment, Date Thereof, and Sentences Imposed*

Said judgment is dated April 27, 1954, and finds appellant guilty of criminal contempt by giving false and evasive testimony under oath and disobedience of two subpoenas duces tecum and the appellant was committed to the Attorney General or his authorized representative for imprisonment in an institution for a period of one year and a day.

5. *Statement as to Confinement or Bail*
Appellant is not in custody.

6. *Statement of Appeal by Appellant*

I, Allen I. Nilva, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the above-stated judgment.

ALLEN I. NILVA

In the District Court of the United States for the
District of North Dakota
Southwestern Division

Criminal No. 8320

In re: Allen I. Nilva

**ORDER GRANTING BAIL AND EXTENDING
STAY OF EXECUTION**

Execution of the sentence imposed in the above entitled action on the 27th day of April, 1954, having been stayed by this Court for Thirty (30) days from and after said date, and again on May 25, 1954 having been stayed for an additional time or until June 7, 1954; now, therefore, the respondent in this action having petitioned this Court through his attorney John W. Graff that he be allowed bail pending an appeal taken from said judgment of conviction, and that an additional stay be granted to allow said Allen I. Nilva to furnish said bail, it is now here

Ordered by this Court that bail be, and the same hereby is granted, and fixed at the sum of \$2,500.00, said bond and said bail to be in effect and continue until the final disposition of the appeal of said appellant to the United States Court of Appeals for the Eighth Circuit or until further order of said United States Court of Appeals, and

It Is Further Ordered that said respondent Allen I. Nilva be granted until Wednesday, June 9, A.D. 1954, within which to furnish said bail bond, and the stay of execution granted on May 25th, 1954, is hereby extended to and including said June 9, A.D. 1954.

Dated this 1st day of June, A.D. 1954.

CHARLES J. VOGEL
Judge, United States District Court

In the United States District Court for the
District of North Dakota
Southwestern Division

Cr. No. 8320

United States of America

vs.

Allen I. Nilva

ORDER

It appearing to the Court that an extension of time within which the record on appeal shall be filed and the appeal shall be docketed in the United States Court of Appeals for the Eighth Circuit is necessary. Now, therefore, it is hereby

Ordered, that the time within which the defendant, Allen I. Nilva, has to file the record on appeal and to docket the appeal in the United States Court of Appeals for the Eighth Circuit, be and the same hereby is extended to and including September 30, 1954. This order is made pursuant to Rule 39(e) of Federal Rules of Criminal Procedure.

Dated at Fargo, North Dakota, this 15th day of June, 1954.

CHARLES J. VOGEL
United States District Judge

In the United States District Court for the
District of North Dakota
Southwestern Division

Cr. No. 8320

United States of America

vs.

Allen I. Nilva

ORDER

It appearing to the Court that a further extension of time within which the record on appeal shall be filed and the appeal shall be docketed in the United States Court of Appeals for the Eighth Circuit is necessary. Now, therefore, it is hereby

Ordered, that the time within which the defendant, Allen I. Nilva, has to file the record on appeal and to docket the appeal in the United States Court of Appeals for the Eighth Circuit, be and the same hereby is extended to and including November 30, 1934. This order is made pursuant to Rule 39(c) of Federal Rules of Criminal Procedure.

Dated at Fargo, North Dakota, this 27th day of September, 1954.

CHARLES J. VOGEL
United States Circuit Judge
Sitting by Assignment

United States Court of Appeals
for the Eighth Circuit

No. 15,224

September Term, 1954

Allen I. Nilva, Appellant,

vs.

United States of America.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NORTH DAKOTA**

Treating letter of counsel for appellant as a motion for a continuance or a setting of this case at the May 1955 session of this Court and on the grounds shown, It Is Ordered by this Court that this case be placed for hearing and submission on the calendar of cases for the May 1955 session. Copy of letter of counsel for the appellee, addressed to counsel for appellant, dated January 17, 1955, has been received and considered.

It Is Further Ordered that the time for printing record and filing brief of appellant be and is hereby extended to and including March 10, 1955, and time for filing printed brief of appellee is extended until to and including April 15, 1955, and reply brief of appellant, if any, may be filed on or before May 5, 1955.

January 19, 1955.

In the United States District Court for the
District of Minnesota
Southwestern Division

No. 15,224

Allen I. Nilva, Appellant,

vs.

United States of America, Appellee.

STIPULATION

It Is Herby Stipulated and Agreed; by and between the above-named parties through their respective counsel, as follows:

That the original exhibits introduced and received in evidence in the trial of the above-captioned case may be filed in the United States Court of Appeals for the Eighth Circuit and upon being so filed, they are to be regarded as being part of the record on the appeal of said case; that the Clerk of this Court hereby be authorized and directed to forward to the Clerk of the United States Court of Appeals all of said exhibits, but said exhibits are not to be forwarded until five (5) days prior to the opening of the May, 1955, term of said United States Court of Appeals for the Eighth Circuit; and that the above-named Court may make and enter the attached proposed Order without any other or further notice to the parties or their attorneys.

JOHN W. GRAFF

HOFFMANN, DONAHUE & GRAFF

Attorneys for Appellant

1220 Minnesota Building

St. Paul 1, Minnesota

ROBERT VOGEL

United States Attorney

Attorney for Appellee

Federal Building

Fargo, North Dakota

In the United States District Court for the
District of Minnesota
Southwestern Division

No. 15,224

Allen I. Nilva, Appellant,

vs.

United States of America, Appellee.

ORDER

Pursuant to the attached foregoing stipulation of the parties through their respective counsel,

It Is Hereby Ordered:

That the Clerk of this Court be and he hereby is authorized and directed to forward to the Clerk of the United States Court of Appeals for the Eighth Circuit at St. Louis, Missouri, all exhibits introduced and received in evidence in the trial of the above-captioned case and that such exhibits are to be forwarded five (5) days prior to the opening of the May, 1955, term of said United States Court of Appeals together with a certified copy of the foregoing Stipulation and Order.

CHARLES J. VOGEL
United States Circuit Judge
Sitting by Assignment

IN THE
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 15,224

Criminal

ALLEN I. NILVA,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
For the District of North Dakota.

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INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

UNITED STATES OF AMERICA

vs.

ELMO T. CHRISTI' NSON
HERMAN PAST ER
ALLAN NILVA

INDICTMENT

Charge:

Violation of Section 371
of Title 18 USCA

THE GRAND JURY CHARGES:

A.

That during all of the times hereinafter in this Indictment mentioned, there was under consideration by the Congress of the United States legislation, the intent and purpose of which was to curb the widespread operations of illegal gambling in the United States and facilitate the imposition and collection of income tax from gamblers and racketeers; or, Sections 1171 to 1177 of Title 15 USCA had been passed or were in full force and effect, the intent and purpose of which was, amongst other things, to curb illegal gambling; assist the states of the United States, which had not acted to exempt themselves from the operations thereof, to enforce their anti-gambling laws, and facilitate the imposition and collection of income tax from gamblers and racketeers; all to be accomplished by:

1. forbidding the transportation of certain said gambling devices hereinafter described, and subassembly or essential parts thereof into said states;
2. requiring dealers and manufacturers amongst other

things to register with the Attorney General of the United States and file with the Attorney General inventories and records of all sales and deliveries, such records to show the mark and number identifying each article together with the name and address of the buyer or consignee as well as the name of the carrier;

3. requiring that all gambling devices when shipped or transported be plainly and clearly labeled or marked so that the name and address of the shipper and consignee, and the nature of the article or contents of the package might be readily ascertained on an inspection of the outside of the article or package;
4. providing for the confiscation of said gambling devices if found to have been unlawfully transported into said state; and

that during all of said time North Dakota was a state in which the operation of gambling devices and gambling was prohibited by law, and a state which had not enacted a law providing for the exemption of such state or any of its subdivisions from the provisions of said Act of Congress aforesaid, and therefore one of the states intended to be benefited by the operation of said Act aforesaid.

That during all of said time one Elmo T. Christianson was either the Attorney General elect or the duly elected and acting Attorney General of said State of North Dakota, and one Herman Paster and one Allan Nilva were officers and in charge of the operations of the Mayflower Distributing Company of St. Paul, Minnesota, which said company was amongst other things engaged in the sale and distribution of gambling devices, their subassembly and essential parts with facilities to do and assist in accomplishing all of the things contemplated to be done as hereinafter set forth.

B.

That the said Herman Paster, the said Allan Nilva, and the said Elmo T. Christianson, hereinafter in this indictment sometimes referred to as the "said defendants" together with one James Brastrup, one Neil Van Berkum, and one Cyrus Bechtel, co-conspirators herein, but not made parties defendant herein, commencing on or about the first day of November, 1950, and continuing during all of the times men-

tioned in the overt acts herein, did at Bismarck, Minot, Grand Forks, and Devils Lake, in North Dakota, at St. Paul, Minnesota, and at Chicago, Illinois, and other places to the grand jurors unknown, unlawfully conspire, combine, confederate and agree together to commit an offense against the United States and its laws in violation of Section 371 of Title 18 USCA in that at said times and places they unlawfully conspired, confederated and agreed together and one with the other to:

1. Violate the provisions of Section 1172 of Title 15 USCA by transporting into places in the State of North Dakota, gambling devices, which said gambling devices hereinafter described are sometimes herein referred to as "said gambling devices" and which consist of:
 - (a) So-called slot machines and machines and mechanical devices, an essential part of which is a drum or reel with insignia thereon, and which when operated might deliver, as the result of the application of an element of chance, money or property, or by the operations of which a person might become entitled to receive, as the result of the application of an element of chance, money or property.
 - (b) Machines and mechanical devices designed and manufactured to operate by means of insertion of a coin and designed and manufactured so that when operated it might deliver, as the result of the application of an element of chance, money or property.
 - (c) Subassemblies and essential parts intended to be used in connection with any such machine and mechanical device; and
2. To defraud the United States of America by impairing, impeding and obstructing the lawful operations of an Act of Congress, to-wit: Sections 1172, 1173, 1174 and 1177 of Title 15 USCA and by defeating and attempting to defeat the intent and purpose of said Act, in the manner and by the following means:
 - (a) That they would, through the facilities of the defendants, Herman Paster and Allan Nilva, as here-

inbefore stated, provide large numbers of said gambling devices to be transported into the State of North Dakota and elsewhere, some of which would be mislabeled in transit or storage, and others to be commingled with legitimate merchandise in transit or storage.

(b) That they would take advantage of the fact that because of legislation under consideration by Congress or legislation already enacted (1171-1177 of title 15 USCA), which amongst other things would prevent many machine owners from legally obtaining essential parts and repairs for said gambling devices, and the fact that many states were tightening up on the enforcement of their anti-gambling statutes, that certain owners of said gambling devices would be willing to sell such gambling devices at low prices, and said defendants Herman Paster and Allan Nilva would be able to, and they thereafter did, obtain said gambling devices at bargain prices for shipment, or replacement of machines shipped, to the State of North Dakota, amongst other places, and for sale at large profits.

(c) That they would take advantage of the fact that defendant Elmo T. Christianson was or soon would be the Attorney General of the State of North Dakota and that by and through him and the corruption of such other officials of the State of North Dakota, and its subdivisions, as could be corrupted, they would make a haven for the illegal operation of said gambling devices in the State of North Dakota; and that by virtue of the influence that he, the said defendant Elmo T. Christianson had, and the influence and authority that he would have and had by virtue of his office of Attorney General and that he would be and was in a position to employ, discharge and control persons acting under him in the departments of the Attorney General and that he would be and was in a position to employ, discharge and control persons acting under him in the departments of the Attorney General's office, whose duty it was to enforce and assist in the enforcement of the anti-gambling laws

of said state, and of the United States, and that they, the said defendants and co-conspirators, or some of them would, and they thereafter did encourage and induce persons in the State of North Dakota, including one Neil Van Berkum, I. F. LaFleur, Jr., Stanley Baeder and Robert Sande, and other persons to the Grand Jurors unknown, some of whom would become dealers without complying with statutes by registering with the Attorney General and filing the required invoices and records, to purchase large numbers of said gambling devices from the Mayflower Distributing Company by representing and promising to said persons aforesaid that they and the persons to whom said gambling devices were to be sold or operated would be permitted to operate said gambling devices in the State of North Dakota without interference from the office of the Attorney General, and that they would be given protection in such unlawful operations in the state of North Dakota, and that the defendant, Elmo T. Christianson, acting through himself and officers and employees of the State of North Dakota under his supervision and control, would, and they thereafter did, in consideration of such promises and representations demand of said persons aforesaid and receive large sums of money.

And it was the intent and purpose of said defendants and co-conspirators aforesaid that by the means aforesaid and in the manner aforesaid that the gambling devices aforesaid, or some of them, could and would get into the hands of unidentified dealers and operators without the Attorney General being apprised of the information required under and by virtue of the provisions of said Act aforesaid, and the United States would be deprived of its facilities intended by said Act to be given it to attain the true intent and purposes thereof, that gambling in North Dakota would flourish with great financial gains to themselves, all in defraudment of the United States in its right to have its laws operate without being impeded, impaired, and obstructed, as aforesaid, for the benefit of all persons intended to be benefited, and in its

right to have its laws attain their true purpose and intent without impairment and obstruction.

C.

And the Grand Jury further presents that the said defendants and co-conspirators at the several times and places in that behalf herein mentioned in connection with their names, did thereafter, among other things, commit certain overt acts in furtherance of said unlawful combination, confederation, agreement and conspiracy to effect the object thereof, as follows, to-wit:

Overt Act 1.

On or about the 15th of November, 1950, Allan Nilva telephoned James Brastrup and instructed the said James Brastrup to get Elmo T. Christianson, and fly to Minneapolis for a meeting with Herman Paster and Allan Nilva.

Overt Act 2.

On or about the 16th of November, 1950; Herman Paster, James Brastrup, and Elmo T. Christianson were flown to Chicago and there entertained and given gifts and were returned to Minneapolis the next day and the said Elmo T. Christianson was given \$1,000.00 by Herman Paster with the understanding that North Dakota would permit certain gambling devices, sold directly or indirectly by Herman Paster and Allan Nilva, to operate, without interference from and with the assistance of the office of the Attorney General of North Dakota.

Overt Act 3.

On or about the 20th day of December, 1950, at Grand Forks, North Dakota, Elmo T. Christianson exhibited \$2,000.00 to James Brastrup which had been paid him by Lou Stearns for the purpose of inducing the Attorney General's office to neglect the enforcement of gambling laws.

Overt Act 4.

On or about the 27th day of December, 1950, Herman Paster telephoned James Brastrup and requested him to bring Elmo T. Christianson to Minneapolis for a conference.

Overt Act 5.

On or about the 28th day of December, 1950, at Minneapolis, Minnesota, Herman Paster purchased for Elmo T. Christianson a new suit, in which to be inaugurated.

Overt Act 6.

On or about the 28th day of December, 1950, at Minneapolis, Minnesota, the said Herman Paster pulled a pistol from his desk, in the presence of James Brastrup, and stated words to the said James Brastrup, to the effect—"Do you know what would happen if anybody double-crossed me or talked too much—they get once—just once," and he further stated that he had men working all over and could ~~hurt~~ someone down very readily.

Overt Act 7.

On or about the 1st day of December, 1950, James Brastrup made a down payment on a Buick car in the amount of \$955.00 which car was being purchased by Elmo T. Christianson.

Overt Act 8.

In North Dakota, on or about December 29, 1950, James Brastrup received of I. F. LaFleur, Jr., a check in the amount of \$300.00, and on or about February 1, 1951, a check in the amount of \$150.00, and on or about March 12, 1951, \$100.00 by check and \$50.00 in cash, and said payments being made with the understanding that said James Brastrup was representing Elmo T. Christianson.

Overt Act 9.

In North Dakota, James Brastrup received of Stanley Baeder the following amounts by check on or about the following date:

December 29, 1950	\$300.00
February 2, 1951	\$200.00
March 14, 1951	\$100.00

with the understanding that said James Brastrup was representing Elmo T. Christianson.

Overt Act 10.

On or about the 2nd day of January, 1951, at Bismarck, North Dakota, the following persons visited the room of James Brastrup for the purpose of conferring with the said James Brastrup regarding actions which Elmo T. Christianson, who was to be inaugurated the next day, might take: Alex Wolf, Robert Sande, Neil Van Berkum, Jack Backus and Bill Beaudoin.

Overt Act 11.

At the Midway Club, between Bismarck and Mandan, in North Dakota, on or about the 2nd day of January, 1951, James Brastrup received from Jerry Boren the sum of \$500.00 and from Bill Beaudoin the sum of \$500.00 and in Bismarck, North Dakota, paid Elmo T. Christianson the sum of \$1,000.00.

Overt Act 12.

That at the Patterson Hotel in Bismarck, North Dakota, on or about the 2nd day of January, 1951, James Brastrup received of Jack Backus the sum of \$200.00 with the understanding that said James Brastrup was representing Elmo T. Christianson, and the said James Brastrup, at that time and place, did call the said Elmo T. Christianson and advise him on the phone that he had received this money.

Overt Act 13.

During the months of December, 1950, and January, 1951, a large number of gambling devices and subassemblies and essential parts were transported into the State of North Dakota, directly or individually, by the defendants Herman Paster and Allan Nilva.

Overt Act 14.

That after the 2nd day of January, 1951, and during said month of January, one or more flat-top coin-operated gambling devices entered the State of North Dakota, being shipped from Mayflower Distributing Company to Neil Van Berkum at Minot, North Dakota.

Overt Act 15.

On or about January 15, 1951, Elmo T. Christianson accompanied by Robert Sande went to his licensing department and ordered the employees at that office to issue a license for each of the machines of the said Robert Sande knowing some of them were so-called flat-tops or console slot machines.

Overt Act 16.

On or about January 15, 1951, Harold Hartje, the brother-in-law of Elmo T. Christianson, at the request and on the agreement of James Brastrup, Herman Paster, and others, went to Herman Paster's establishment in Minneapolis for the purpose of learning about the operation, maintenance and repair of said gambling devices.

Overt Act 17.

On or about January 30, 1951, James Brastrup travelled to Bismarck to deliver to Elmo T. Christianson \$400.00 which had been collected by the said James Brastrup from machine operators Stanley Baeder, I. F. LaFleur, Jr., and Neil Van Berkum.

Overt Act 18.

On or about the 15th of February, 1951, Robert Sande, Neil Van Berkum and Stanley Baeder began notifying and complaining by letter and telephone to the said James Brastrup that their machines were being hampered in their operation and demanded that the promises of the defendants be made good.

Overt Act 19.

That between November 1, 1950, and March 1, 1951, Neil Van Berkum paid to James Brastrup the sum of \$815.00, \$250.00 and two \$100.00 payments with the understanding that said James Brastrup was there and then representing Elmo T. Christianson.

Overt Act 20.

On or about the 28th day of February, 1951, Cyrus Bechtel, an inspector for the Attorney General's office, in the Ryan Hotel, Grand Forks, was instructed to contact the Club and advise them that they could operate gambling devices if they

would contribute money, said instructions being given by Elmo T. Christianson.

Overt Act 21.

That on or about April 15, 1951, on instructions of Elmo T. Christianson, Cyrus Bechtel, an inspector for the Attorney General's Department, contacted Freeman Anderson, who was then Secretary of the Knights of Pythias, and advised him that they would be able to operate gambling devices, but would have to contribute about ten per cent.

Filed 10-7-52.

Prior to the second Christianson trial, the above Indictment was modified, upon motion to strike, as follows:

(Caption)

Criminal No. 8158

UNITED STATES OF AMERICA

vs.

ELMO T. CHRISTIANSON
HERMAN PASTER

INDICTMENT

Charge:

Violation of Section 371
of Title 18 USCA

THE GRAND JURY CHARGES:

A.

That during all of the times hereinafter in this indictment mentioned, there was under consideration by the Congress of the United States legislation, the intent and purpose of which was to curb illegal gambling in the United States; or, Sections 1171 to 1177 of Title 15, USCA had been passed or were in full force and effect, the intent and purpose of

which was, amongst other things, to curb illegal gambling; assist the states of the United States, which had not acted to exempt themselves from the operations thereof to enforce their anti-gambling laws; and all to be accomplished by:

1. forbidding the transportation of certain said gambling devices hereinafter described, and subassembly or essential parts thereof into said states;
2. requiring dealers and manufacturers amongst other things to register with the Attorney General of the United States and file with the Attorney General inventories and records of all sales and deliveries, such records to show the mark and number identifying each article together with the name and address of the buyer or consignee as well as the name of the carrier;
3. requiring that all gambling devices when shipped or transported be plainly and clearly labelled or marked so that the name and address of the shipper and consignee, and the nature of the article or contents of the package might be readily ascertained on an inspection of the outside of the article or package;
4. providing for the confiscation of said gambling devices if found to have been unlawfully transported into said states; and,

that during all of said time North Dakota was a state in which the operation of gambling devices and gambling was prohibited by law, and a state which had not enacted a law providing for the exemption of such state or any of its subdivisions from the said Act of Congress aforesaid, and therefore one of the states intended to be benefited by the operation of said Act aforesaid.

That during all of said time one Elmo T. Christianson was either the Attorney General elect or the duly elected and acting Attorney General of said State of North Dakota, and one Herman Paster was an officer and in charge of the operations of the Mayflower Distributing Company of St. Paul, Minnesota, which said Company was amongst other things engaged in the sale and distribution of gambling devices, their subassembly and essential parts with facilities to do and assist in accomplishing all of the things contemplated to be done as hereinafter set forth.

B.

That the said Herman Paster, and the said Elmo T. Christianson, hereinafter in this indictment sometimes referred to as the "said defendants" together with one James Brastrup, one Neil Van Berkum, and one Cyrus Bechtel, co-conspirators herein, but not made parties defendant herein, commencing on or about the sixth day of November, 1950, and continuing during all of the times mentioned in the overt acts herein, did at Bismarck, Minot, Grand Forks, and Devils Lake, in North Dakota, at St. Paul, Minnesota, and at Chicago, Illinois, and other places to the grand jurors unknown, unlawfully conspire, combine, confederate and agree together to commit an offense against the United States and its laws in violation of Section 371 of Title 18 USCA in that at said times and places they unlawfully conspired, confederated and agreed together and one with the other to:

1. Violate the provisions of Section 1172 of Title 15 USCA by transporting into places in the State of North Dakota, from places outside of said state, gambling devices, which said gambling devices hereinafter described are sometimes herein referred to as "said gambling devices" and which consist of
 - (a) so-called slot machines and machines and mechanical devices, an essential part of which is a drum or reel with insignia thereon, and which when operated might deliver, as the result of the application of an element of chance, money or property, or by the operation of which a person might become entitled to receive, as the result of the application of an element of chance, money or property.
 - (b) Machines and mechanical devices designed and manufactured to operate by means of insertion of a coin and designed and manufactured so that when operated it might deliver, as the result of the application of an element of chance, money or property.
 - (c) Subassemblies and essential parts intended to be used in connection with any such machine and mechanical device and
2. To defraud the United States of America by impairing, impeding and obstructing the lawful operations of an

Act of Congress, to-wit, Sections 1172, 1173, 1174, and 1177 of Title 15 USCA and by defeating and attempting to defeat the intent and purpose of said Act, in the manner and by the following means:

- (a) That they would, through the facilities of the defendant, Herman Paster, as hereinbefore stated, provide large numbers of said gambling devices to be transported into the State of North Dakota and elsewhere, some of which would be mislabelled in transit or storage, and others to be commingled with legitimate merchandise in transit or storage.
- (b) That they would take advantage of the fact that because of legislation under consideration by Congress or legislation already enacted (1171-1177 of Title 15 USCA), which amongst other things would prevent many machine owners from legally obtaining essential parts and repairs for said gambling devices, and the fact that many states were tightening up on the enforcement of their anti-gambling statutes, that certain owners of said gambling devices would be willing to sell such gambling devices at low prices, and said defendant Herman Paster would be able to, and he thereafter did, obtain said gambling devices at bargain prices for shipment, or replacement of machines shipped, to the State of North Dakota, amongst other places, and for sale at large profits.
- (c) That they would take advantage of the fact that the defendant Elmo T. Christianson was or soon would be the Attorney General of the State of North Dakota and that by and through him and the corruption of such other officials of the State of North Dakota, and its subdivisions, as could be corrupted, they would make a haven for the illegal operation of said gambling devices in the State of North Dakota; and that by virtue of the influence that he, the said defendant Elmo T. Christianson had, and the influence and authority that he would have and had by virtue of his office of Attorney General and that he would be and was in a position to employ, discharge and control persons acting

under him in the departments of the Attorney General's office, whose duty it was to enforce and assist in the enforcement of the anti-gambling laws of said state, and of the United States, and that they, the said defendants and co-conspirators, or some of them would, and they thereafter did encourage and induce persons in the State of North Dakota, including one Neil Van Berkum, I. F. LaFleur, Jr., Stanley Baeder, and Robert Sande, and other persons to the Grand Jurors unknown, some of whom would become dealers without complying with statute by registering with the Attorney General and filing the required invoices and records, to purchase large numbers of said gambling devices from the Mayflower Distributing Company by representing and promising to said persons aforesaid that they and the persons to whom said gambling devices were to be sold or operated would be permitted to operate said gambling devices in the State of North Dakota without interference from the office of the Attorney General, and that they would be given protection in such unlawful operations in the State of North Dakota, and that the defendant, Elmo T. Christianson, acting through himself and officers and employees of the State of North Dakota under his supervision and control, would, and they thereafter did, in consideration of such promises and representations demand of said person aforesaid and receive large sums of money.

And it was the intent and purpose of said defendants and co-conspirators aforesaid that by the means aforesaid and in the manner aforesaid that the gambling devices aforesaid, or some of them, could and would get into the hands of unidentified dealers and operators without the Attorney General being apprised of the information required under and by virtue of the provisions of said Act aforesaid, and the United States would be deprived of its facilities intended by said Act to be given it to attain the true intent and purpose thereof; that gambling in North Dakota would flourish with

great financial gains to themselves, all in defraudment of the United States in its right to have its laws operate without being impeded, impaired, and obstructed, as aforesaid, for the benefit of all persons intended to be benefited, and in its right to have its laws attain their true purpose and intent without impairment and obstruction.

C.

And the Grand Jury further presents that the said defendants and co-conspirators at the several times and places in that behalf herein mentioned in connection with their names, did thereafter, among other things, commit certain overt acts in furtherance of said unlawful combination, confederation, agreement and conspiracy to effect the object thereof, to-wit:

Overt Act 1.

On or about the 15th day of November, 1950, Allan Nilva telephoned James Brastrup and instructed the said James Brastrup to get Elmo T. Christianson, and fly to Minneapolis for a meeting with Herman Paster and Allan Nilva.

Overt Act 2.

On or about the 16th day of November, 1950, Herman Paster, James Brastrup, and Elmo T. Christianson were flown to Chicago and there entertained and given gifts and were returned to Minneapolis the next day and the said Elmo T. Christianson was given \$1,000.00 by Herman Paster with the understanding that North Dakota would permit certain gambling devices, sold directly or indirectly by Herman Paster and Allan Nilva, to operate, without interference from any with the assistance of the office of the Attorney General of North Dakota.

Oyert Act 3.

On or about the 20th day of December, 1950, at Grand Forks, North Dakota, Elmo T. Christianson exhibited \$2,000.00 to James Brastrup which had been paid him by Lou Stearns for the purpose of inducing the Attorney General's office to neglect the enforcement of gambling laws.

Overt Act 4.

On or about the 27th day of December, 1950, Herman Paster telephoned James Brastrup and requested him to bring Elmo T. Christianson to Minneapolis for a conference.

Overt Act 5.

On or about December 28, 1950, at Minneapolis, Minnesota, Herman Paster purchased for Elmo T. Christianson a new suit, in which to be inaugurated.

Overt Act 6.

On or about the 28th day of December, 1950, at Minneapolis, Minnesota, the said Herman Paster pulled a pistol from his desk, in the presence of James Brastrup, and stated words to the said James Brastrup, to the effect—"Do you know what would happen if anybody double-crossed me or talked too much—they get once—just once," and he further stated that he had men working all over and could hunt someone down very readily.

Overt Act 7.

On or about the 1st day of December, 1950, James Brastrup made a down payment on a Buick car in the amount of \$955.00, which car was being purchased by Elmo T. Christianson.

Overt Act 8.

In North Dakota, on or about December 29, 1950, James Brastrup received of I. F. LaFleur, Jr., a check in the amount of \$300.00, and on or about February 1, 1951, a check in the amount of \$150.00, and on or about March 12, 1951, \$100.00 by check and \$50.00 in cash, said payments being made with the understanding that said James Brastrup was representing Elmo T. Christianson.

Overt Act 9.

In North Dakota, James Brastrup received of Stanley Baeder the following amounts by check on or about the following dates:

December 29, 1950	\$300.00
February 2, 1951	\$200.00
March 14, 1951	\$100.00

with the understanding that said James Brastrup was representing Elmo T. Christianson.

Overt Act 10.

On or about the 2nd day of January, 1951, at Bismarck, North Dakota, the following persons visited the room of James Brastrup for the purpose of conferring with the said James Brastrup regarding actions which Elmo T. Christianson, who was to be inaugurated the next day, might take: Alex Wolf, Robert Sande, Neil Van Berkum, Jack Backus and Bill Beaudoin.

Overt Act 11.

At the Midway Club, between Bismarck and Mandan in North Dakota, on or about the 2nd day of January, 1951, James Brastrup received from Jerry Boren the sum of \$500.00 and from Bill Beaudoin the sum of \$500.00 and in Bismarck, North Dakota, paid Elmo T. Christianson the sum of \$1,000.00.

Overt Act 12.

That at the Patterson Hotel, in Bismarck, North Dakota, on or about the 2nd day of January, 1951, James Brastrup received of Jack Backus the sum of \$200.00 with the understanding that said James Brastrup was representing Elmo T. Christianson, and the said James Brastrup, at that time and place, did call the said Elmo T. Christianson and advise him on the phone that he had received this money.

Overt Act 13.

During the months of December, 1950, and January, 1951, a large number of gambling devices and subassemblies and essential parts were transported into the State of North Dakota, directly or individually, by the defendant, Herman Paster, and Allan Nilva.

Overt Act 14.

That after the 2nd day of January, 1951, and during said month of January, one or more flat-top coin-operated gambling devices entered the State of North Dakota, being shipped from Mayflower Distributing Company to Neil Van Berkum at Minot, North Dakota.

Overt Act 15.

On or about January 15, 1951, Elmo T. Christianson accompanied by Robert Sande went to his licensing department and ordered the employees at that office to issue a license for each of the machines of the said Robert Sande knowing some of them were so-called flat-tops or console slot machines.

Overt Act 16.

On or about January 15, 1951, Harold Harje, the brother-in-law of Elmo T. Christianson, at the request and on the agreement of James Brastrup, Herman Paster, and others, went to Herman Paster's establishment in Minneapolis for the purpose of learning about the operation, maintenance and repair of said gambling devices.

Overt Act 17.

On or about January 30, 1951, James Brastrup travelled to Bismarck to deliver to Elmo T. Christianson, \$400.00 which had been collected by the said James Brastrup from Machine Operators Stanley Baeder, I. F. LaFleur, Jr., and Neil Van Berkum.

Overt Act 18.

On or about the 15th day of February, 1951, Robert Sande, Neil Van Berkum and Stanley Baeder began notifying and complaining by letter and telephone to the said James Brastrup that their machines were being hampered in their operation, and demanded that the promise of the defendants be made good.

Overt Act 19.

That between November 1, 1950, and March 1, 1951, Neil Van Berkum paid to James Brastrup the sums of \$815.00, \$250.00, and two \$100.00 payments, with the understanding that said James Brastrup was there and then representing Elmo T. Christianson.

Overt Act 20.

On or about the 28th day of February, 1951, Cyrus Bechtel, an inspector for the Attorney General's office, in the Ryan Hotel, Grand Forks, was instructed to contact the Clubs and advise them that they could operate gambling devices if they

would contribute money, said instructions being given by Elmo T. Christianson.

Overt Act 21.

That on or about April 15, 1951, on instructions of Elmo T. Christianson, Cyrus Bechtel, an inspector for the Attorney General's Department, contacted Freeman Anderson, who was then Secretary of the Knights of Pythias, and advised him that they would be able to operate gambling devices, but would have to contribute about ten per cent.

(Caption).

Court convened pursuant to adjournment at 9:15 A. M., o'clock, at Bismarck.

Present:

Honorable Charles J. Vogel, Judge,
and the Officers of the Court.

Court was duly opened.

Criminal No. 8158:

United States of America,

Plaintiff

vs.

Elmo T. Christianson, Herman Paster and Allan Nilva,
Defendants

At 9:15 A. M., the jury deliberating in this case, returned to the courtroom for further instructions, all defendants and Court being present, attorney William P. Murphy, representing defendants Herman Paster and Allan Nilva, Alvin C. Strutz present as attorney for Elmo T. Christianson, and William R. Mills, Assistant United States Attorney, present for the United States. All the attorneys agreed that the written charge should go to the jury room with the jury,

after which the jurors again retired to the jury room for further deliberation.

At 2:00 P. M. Court, counsel and all defendants appeared in the Chambers and the Court notified the attorneys of a message he had received through the Marshal from the jury, and read to the attorneys an instruction he might give to the jury for further consideration; whereupon at 3:05 P. M., the jury returned to the jury box, with the Court, officers, attorneys, defendants, and all other necessary parties present, at which time the Court gave an additional charge to the jury. Court then adjourned to chambers and defense attorneys Murphy and Strutz took exception to the additional charge, after which the jury retired to the jury room for further deliberation.

At 5:00 P. M. the jury returned to the courtroom with Court officers, all defendants and attorneys present and the jury returned the following verdict of not guilty as to defendant Allan Nilva, and reported, a disagreement as to defendants Herman Paster and Elmo T. Christianson, which verdict and report were received and ordered recorded:

"VERDICT"

We, the jury, find the defendant, Allan Nilva, not guilty.
Dated at Bismarck, North Dakota, this 8th day of April,
A. D. 1953..

C. L. ARMOUR,
Foreman."

AND THEREAFTER, at 9:00 A. M. of Thursday, April 22, 1954, the jury returned its verdict, which, omitting the caption, is in words and figures as follows:

"We, the jury, empaneled and sworn to try the above entitled action, find the defendants guilty, as charged in the Indictment.

Dated at Bismarck, North Dakota, this 21st day of April,
A. D. 1954.

(Signed) H. E. Sehler, Foreman."

The Court: The verdict will be received and recorded as it has been read.

(Caption)

MOTION TO QUASH SUBPOENAS

Upon the accompanying affidavits of Herman Paster and Walter D. Johnson and upon the files and records herein, the defendant Herman Paster respectfully moves for an order of this Court quashing and suppressing Subpoenas Nos. 76, 80, 78, 81, 79, 77 and 160, issued by the Clerk of the above Court and directed to certain corporations solely owned and controlled by the defendant Herman Paster.

The defendant Herman Paster further moves for an order of the Court returning all of the exhibits in the form of records, invoices and other documents produced by the defendants in the original trial of this action.

That the grounds for quashing and suppressing these said subpoenas and requiring the return of the exhibits heretofore produced are that said requirements for production is in violation of the defendant's rights under the fourth and fifth Amendments in that he has been required, and is now directed, to furnish evidence against himself.

SILVER, GOFF, MURPHY, RYAN and DILLON

By William P. Murphy,

Attorney for Defendant Herman Paster

1008 Minnesota Building

St. Paul 1, Minnesota.

Filed 3-29-54.

(Caption)

AFFIDAVIT**State of Minnesota****County of Ramsey—ss.**

Herman Paster, being first duly sworn, upon oath deposes and says that he is one of the defendants in the above entitled action. That the Mayflower Distributing Company is a corporation organized under the laws of the State of Minnesota in September of 1946. That the Paster Distributing Company is a corporation organized under the laws of the State of Minnesota in February of 1946. That the Progress Finance Corporation was organized under the laws of the State of Minnesota in June of 1947.

That affiant is the owner of said corporations above named and the outstanding stock of all of said corporations now, and for more than three years past has been, in affiant's name. That affiant is the President of said corporations and one Walter D. Johnson, who acts as bookkeeper in charge of the keeping of the accounts and records of said corporation, is nominally the Secretary of same. That affiant, during all of the time mentioned herein, has had exclusive possession and control of all of the books and records of the said corporations.

Prior hereto, there was issued by the Clerk of the United States District Court for the District of North Dakota Subpoena No. 76 directed to the Paster Distributing Company, requiring the production of all books, records, letters, memoranda, etc., of said corporation and papers relating to transactions with certain individuals in the State of North Dakota, as well as all invoices, freight bills, letters and book-keeping records in connection with the Paster Distributing Company, Mayflower Distributing Company and Progress Finance Company. That said subpoena is returnable March 22, 1954.

That the said Clerk of the United States District Court for the District of North Dakota has issued a subpoena No. 80 directed to the Progress Finance Company asking for the production of substantially the same documentary evidence as described in the subpoena directed to the Paster Distributing Company heretofore referred to.

That the said Clerk of United States District Court for the District of North Dakota has issued subpoena No. 78 directed to the Mayflower Distributing Company requesting the production of books and records substantially as described in the foregoing paragraphs relating to subpoenas Nos. 76 and 80.

That the Clerk of the said United States District Court for the District of North Dakota has issued subpoena No. 81 directed to Walter Johnson, Treasurer, Progress Finance Company, directing the production of books, records and other documents substantially as described in the subpoenas herein referred to.

That the said Clerk of United State District Court has issued its subpoena No. 79 addressed to Walter D. Johnson, Secretary-Treasurer, Mayflower Distributing Company, directing the production of books, records and other documentary evidence the same as referred to in the subpoenas heretofore noted.

That the said Clerk of United States District Court for the District of North Dakota has issued its subpoena No. 77 directed to Walter D. Johnson, Secretary-Treasurer, Paster Distributing Company; directing the production of books, records, and other documentary evidence, the same as referred to in the subpoena heretofore noted.

The said United States District Court for the District of North Dakota has issued its subpoena No. 160 directed to the Mayflower Distributing Company, directing the production of all invoices, bills, checks, slips, papers, records, letters, ledger sheets, bookkeeping records, journals and copies thereof between, by or concerning Mayflower Distributing Company, made, entered, sent or received from July 1, 1950, through April 30, 1951, both dates inclusive, reflecting any and all purchases, sales, trades, exchanges or transfers, both domestic and foreign of any and all slot machines, flat-top or console, coin operated device, whether new or used with any persons, firm or concern. The records demanded in this subpoena are in addition to those previously subpoenaed."

The said Walter D. Johnson is employed by affiant as bookkeeper and auditor and holds the nominal position of Secretary of the Mayflower Distributing Company and Paster

Distributing Company. That during said period of time he has been in name Treasurer of Progress Finance Company. That the said Walter D. Johnson does not own stock in any of these companies and the office he holds in merely nominal. All of said stock in each of said companies is owned by affiant. The said Walter D. Johnson's duties consist of acting as auditor and bookkeeper and supervising the office help which includes about five people. That all of said records, books and other documents relating to the affairs of said corporations are kept and maintained on the premises, 2218 University Avenue, St. Paul, Minnesota, under the direct control of the affiant, and that said books, records and documents are in the possession of the affiant.

That affiant makes this affidavit in support of a motion to quash the subpoenas for the production of said records in court on the ground that enforcement of said subpoenas would constitute a denial of his rights under the fourth and fifth amendments.

Affiant further states that at the first trial of this action certain records of the corporations' owned by him were produced and introduced in evidence; that said records were produced without objection on the part of affiant's attorneys for the reason that he was advised the so-called Johnson Act, effective January 2, 1951, removed any immunity which might attach to said records. Affiant has been informed and believes that the Supreme Court of the United States has held the record keeping requirements of the said Johnson Act to be unconstitutional, and affiant consequently asserts his constitutional rights to immunity with relation to said documents and requests the return of them.

HERMAN PASTER

(Caption)

AFFIDAVIT

**State of Minnesota
County of Ramsey—ss.**

Walter D. Johnson, being first duly sworn, deposes and says that for more than six years last past he has been employed by Herman Paster of St. Paul, Minnesota, in the capacity of bookkeeper and auditor with relation to the maintenance of records and keeping accounts of the Mayflower Distributing Company, the Paster Distributing Company and the Progress Finance Company. That affiant supervises the clerical and bookkeeping functions in connection with said corporations, but the immediate possession and control of said records, books and other documents of said corporations is in the said Herman Paster, his employer. That although affiant holds the position of Secretary of the Mayflower Distributing Company, Secretary of the Paster Distributing Company and Treasurer of the Progress Finance Company, those positions are in fact nominally held by him; he is not the owner of any stock in said corporations nor does he exercise any voice in the management or control of them. His duties are performed at the direction of his employer, Herman Paster.

WALTER D. JOHNSON

(Caption)

ORDER DENYING MOTION TO QUASH SUBPOENAS

The above entitled matter came before the Court, the Honorable Charles J. Vogel, Judge, at Bismarck, North Dakota, on the 29th day of March, 1954, upon the motion of the defendant, Herman Paster, for an order of this Court quashing and suppressing Subpoenas Nos. 76, 80, 78, 81, 79, 77 and 160, and for an order of this Court returning all of the exhibits in the form of records, invoices and other documents produced by the defendants in the original trial of the above entitled action; Mr. William P. Murphy; of St. Paul, Minnesota, appearing for the defendant, Herman Paster, in support of said motion, and Mr. Oliver Dibble,

Special Assistant to the United States Attorney, of Washington, D. C., and Mr. William R. Mills, Assistant United State Attorney of Bismarck, North Dakota, appearing for the United States of America; and the Court having heard the arguments of counsel, and being fully advised in the premises; now, therefore, it is

ORDERED that said motion to quash and suppress be, and the same hereby is in all things, denied, and the request for an order for the return of all of the exhibits in the form of records, invoices and other documents produced by the defendants in the original trial be, and the same hereby is, denied.

Dated this 29th day of March, A.D. 1954.

CHARLES J. VOGEL

Judge, United States District Court.

PROCEEDINGS PRELIMINARY TO ISSUANCE OF
ORDER PURSUANT TO RULE 17(e) FOR FORTH-
WITH PRODUCTION OF RECORDS

The following is found on pages 42, 43 and 103 of the Transcript in the Christianson case. 78

(Pages 42-3, referring to Subpoena No. 76:)

* * * *

Mr. Murphy: * * * That subpoena was returnable on the 22nd, a week ago and they have had notice that it is returnable today because of the continuance of the case.

(Page 103, referring to Forthwith Order:)

Mr. Murphy: Your Honor, you have made your order, I will see Mr. Johnson and get them here at the first possible moment.

* * * *

(Caption)

ORDER IMPOUNDING RECORDS

It appearing to the Court that the plaintiff, the United States of America, in the above entitled action, has subpoenaed certain officers of the Mayflower Distributing Company, the Paster Distributing Company and the Progress Finance Company, all corporations, to produce certain books and records of said corporations as appears by Subpoenas Numbered 76, 77, 78, 79, 80 and 160 issued out of this Court, and it further appearing to the Court that the defendant, Herman Paster, through his attorney, moved to quash said subpoenas, and the matter having come on for hearing before this Court on the 29th day of March, 1954, the Court on said date made an order denying in all things the Motion to Quash said subpoenas.

And it further appearing to the Court that said plaintiff, the United States of America thereupon made an oral motion pursuant to Rule 17(e) of the Criminal Rules of Procedure for an order requiring said corporations to forthwith produce for the inspection of the United States Attorney all of said records described in said above-numbered subpoenas, and this Court made an order granting said motion and ordering the production of said records forthwith.

And it further appearing to the Court on this the 1st day of April, 1954, that the officers of the Mayflower Distributing Company have failed to produce the records described in Subpoena No. 160 issued out of this Court as aforesaid.

IT IS, THEREFORE, ORDERED that all of the records of the Mayflower Distributing Company, the Paster Distributing Company and the Progress Finance Company, all corporations, whether kept at No. 2218 University Avenue, St. Paul, Minnesota, or wheresoever now kept be impounded and taken into the possession of the United States Marshal of the District of North Dakota, to be produced in this Court whenever required, and not to be released from the custody of the said United States Marshal until the further order of this Court.

AND IT IS FURTHER ORDERED that for the purpose of aiding in the enforcement of this Order a Writ of Assistance issue forthwith by the Clerk of this Court, directed to the Marshal of the District of North Dakota.

Dated at Bismarck, North Dakota, this 1st day of April,
1954.

CHARLES J. VOGEL

Judge

Filed 4-1-54

(Caption)

WRIT OF ASSISTANCE

**THE PRESIDENT OF THE UNITED STATES TO JOHN
C. EATON, UNITED STATES MARSHAL FOR THE
DISTRICT OF NORTH DAKOTA:**

For the purpose of executing the order of this Court of this date, a certified copy of which is hereto attached, and that certain Order of this Court made on March 29, 1954, ordering the Mayflower Distributing Company, the Paster Distributing Company and the Progress Finance Company, all corporations, located at 2218 University Avenue, St. Paul, Minnesota, to forthwith produce for inspection by the United States Attorney, certain books and records described in Subpoenas No. 76, 77, 78, 79, 80 and 160 issued out of this Court, the Mayflower Distributing Company having failed to forthwith produce the records described in Subpoena No. 160 aforesaid,

**YOU, JOHN EATON, UNITED STATES MARSHAL
for the District of North Dakota are hereby commanded to
put the United States of America in possession of the records
described in said subpoena, directed to the Mayflower Dis-
tributing Company, 2218 University Avenue, St. Paul, Min-
nesota, as follows:**

"All invoices, bills, checks, slips, papers, records,
letters, ledger sheets, bookkeeping records, journals, and
copies thereof, between, by or concerning Mayflower Dis-
tributing Company, made, entered, sent or received from
July 1, 1950, through April 30, 1951, both dates inclu-
sive; reflecting any and all purchases, sales, trades, ex-
changes, or transfers, both domestic and foreign, of any
and all slot machines, flat-top or console, coin operated

devices, whether new or used, with any persons, firm or concern."

WITNESS, the Honorable Charles J. Vogel, Judge of the United States District Court this 1st day of April, 1954. Issued at my office, at Bismarck, North Dakota under the seal of this Court the date and year last aforesaid.

Beatrice A. McMichael

(SEAL)

Clerk, U. S. District Court.

RECEIPT AND INVENTORY PER ORDER OF THE
COURT FOR THE FOLLOWING RECORDS

MAYFLOWER DISTRIBUTING CO.

PASTER DISTRIBUTING COMPANY

HOLLY SALES COMPANY

PASTER ENTERPRISES

DATED MONDAY, APRIL 5, 1954

Bill of Ladings for year 1950 of the Mayflower Distributing Co., St. Paul, from A to Z.

Bill of Ladings for year 1951 of the Mayflower Distributing Co., St. Paul, from A to Z.

Mayflower Distributing Co., Omaha, Inventory Book.

Mayflower Distributing Co., St. Paul, Check Register for years 1946-47-48-49-50-51-52.

Mayflower Distributing Co., St. Paul, Journals for years starting February 1946 and 1947-48-49-50-51-52.

Mayflower Distributing Co., St. Paul, Purchase Journal for years January, 1949; January, 1950; January, 1951; January, 1952; February, 1948; February, 1949; February, 1950, and February, 1951. Also, Accounts Payable Closed Accounts.

1951 General Ledgers for the Mayflower Distributing Co., St. Paul,

Holly Sales Company, St. Paul

Paster Distributing Co., St. Paul.

Paster Distributing Co., Milwaukee.

Mayflower Distributing Co., Omaha.

1950 General Ledgers for the Paster Distributing Co., St. Paul,

Paster Distributing Co., Milwaukee.

Mayflower Distributing Co., St. Paul.

Mayflower Distributing Co., Omaha.

Paster Enterprises.

Holly Sales Company.

Stock tags for Mayflower Distributing Co., St. Paul.

Invoices dated December 1, 1950, to January 31, 1951, for Mayflower Dist. Co., St. Paul.

Mayflower Distributing Co., St. Paul, C.O.D.'s for years February 1, 1951, thru January 15, 1952.

Mayflower Distributing Co., St. Paul C.O.D.'s for years May 26, 1949 thru January, 1951.

Mayflower Distributing Co., St. Paul Parts Invoices No. 8840 dated August 9, 1950 thru No. 10779 dated January 31, 1951. Not including invoices removed.

Mayflower Distributing Co., St. Paul Parts Invoices No. 10780 dated February 1, 1951 thru No. 12594 dated July 31, 1951. Not including invoices removed.

Mayflower Distributing Co., Credit Memos No. 891 on February 1, 1950 thru No. 1563 dated January 31, 1951. Not including credit memos removed.

Mayflower Distributing Co., Credit Memos No. 1564 dated February 1, 1951 thru No. 2009 dated January 31, 1952. Not including credit memos removed.

Mayflower Distributing Co., Invoices No. 2022B dated July 1, 1950, thru No. 35988 dated November 30, 1950. Not including invoices removed.

Mayflower Distributing Co., Invoices No. 4129B dated February 1, 1951 thru No. 5482B dated January 31, 1952. Not including invoices removed.

Mayflower Dist. Co., Sales Slips and Credit Memos for years: November 28, 1950 to March 12, 1951
December 4, 1950 to January 15, 1951
November 4, 1950 to December 2, 1950
August 11, 1950 to November 10, 1950. Also duplicate copies dated:

November 28, 1950 to December 20, 1950
December 19, 1950 to January 19, 1950
January 8, 1951 to March 6, 1951

Bank Statements and Checks of Mayflower Distributing Co.,
St. Paul dated:

November, 1950
December, 1950
January, 1951
February, 1951

Receiving Slips dated November, 1950, December, 1950, January, 1951, February, 1951, March, 1951 and April, 1951.

Mayflower Distributing Co., St. Paul shipping slips for November, 1950, December, 1950, January, 1951, February, 1951 and March, 1951.

One Folder marked Purchase File with following checks:

Check No. 2616 for \$375.00 dated February 19, 1951 to Sam Nilva for purchase of used equipment.

Check No. 2649 for \$295.00 dated February 24, 1951, to Sam Nilva for purchase of used machines.

Check No. 2211 for \$1,750.00 dated November 24, 1950 to Midway National Bank, Sight Draft for ten Citations.

Check No. 2315 for \$1,416.50 dated December 19, 1950 to Midway National Bank, Note for Certification. Receipt for check.

Check No. 2443 for \$573.00 dated January 17, 1951 to Midway National Bank, Sight Draft to Golden Gate Novelty.

Check No. 2371 for \$201.00 dated January 4, 1951 to Midway National Bank, Sight Draft.

Check No. 2421 for \$750.00 dated January 9, 1951 to Sam Nilva for reimbursement for personal check to Don Hall for purchase of machines.

Check No. 2359 for \$700.00 dated January 2, 1951 to Leonard Spektor for reimbursement for purchase of machines on bill of sale December 30, 1950 purchased from the Moose Club.

Check No. 2358 for \$1,489.07 dated January 2, 1951 to Allan I. Nilva for reimbursement for purchase of machines, purchase order dated December 29, 1950.

Check No. 2370 for \$300.00 dated December 31, 1950 to Commissioned Officers Mess for purchase of 17 machines.

Check No. 2428 for \$610.00 to Sam Nilva dated January 11, 1951 for reimbursement for checks drawn on purchase of machines.

Check No. 2350 for \$75.00 dated December 28, 1950 to Matt Luby for one American Cushionboard.

One Folder containing: Copy of telegram to Mrs. E. T. Christianson with signature of Elmo dated November 25th saying "Will return Saturday."

Copy of telegram to Mrs. J. L. Brastrup, Grand Forks, North Dakota, dated November 25th saying "Sorry, will be unable to be home until Saturday, Love, Jim."

Written copy of telegram to Mrs. Christianson in hand writing.

Telegram dated November 24th to Bally Mfg. Co., saying "Ship 12 M280-2 DI Slug Rejectors." Signed Mayflower Dist. Co.

Telegram to Mrs. Julius Swenson, Riverview Route No. 1, St. Paul, Minnesota, saying "Contact me at 5 p.m. Friday about work." Dated Sunday morning and signed by Mrs. Herman Paster.

Petty Cash Slips and 3 vouchers for petty cash.

Letter dated March 9, 1951 to Mr. Jack Chiate, Phoenix, Arizona.

One group of reports and letters covering shipments in November and December for the Mayflower Dist. in Omaha.

One Folder containing Correspondence file for Pete Weyh, Mayflower Dist. Co., Omaha Inter Office Purchase File.

One Folder containing: Bally Mfg. Co., Correspondence File for February, 1951 thru January, 1952.

3 groups of loose leaf inventory records.

File of Mayflower Dist. Co., Omaha of 1950 shipping records and bill of lading on merchandise shipped for St. Paul.

One Folder marked W. D. Johnson and Omaha Inter Office correspondence file.

One File for Mayflower Distributing Co., Omaha marked general correspondence.

One File for Mayflower Distributing Co., Omaha containing shipping sheets for year 1950 and January, 1951.

One group of loose leaf inventory on Mayflower Distributing Co., Omaha.

One group of Mayflower Distributing Co., Omaha, Inventory work sheets for November, 1950, December, 1950, January, 1951, February, 1951 and March, 1951.

Copies of weekly reports from Mayflower Distributing Co., Omaha for October 9, 1950 to April 21, 1951.

Mayflower Distributing Co., Invoices reportedly numbered No. 4161, January 31, 1951 thru No. 4702, September 29, 1951. No. 3564, October 2, 1950 thru No. 4160, January 30, 1951.

Inventory sheet, described "Lexington Used."

Received from Mayflower Distributing Co.
April 5, 1954

C. ENARD ERICKSON
U. S. Marshal, Dist. of Minnesota
By Charles E. Morrison
Chief Deputy, U. S. Marshal

Filed 4-9-54.

PROCEEDINGS PRELIMINARY TO ORDER OF CONTINUANCE

(Note: The following is found on pages 805, 806 and 807 of the transcript in the Christianson case:)

MORNING SESSION, THURSDAY, APRIL 8, 1954.

Pursuant to adjournment as aforesaid, at ten o'clock a.m. of said Thursday, April 8, 1954, the Court met, present and presiding as before, and the following proceedings were had in chambers out of the presence and hearing of the jury:

Mr. Dibble: If the Court pleases, the reason I asked to come in this morning is because of the necessary delay

which has developed, because of the great volume of records that we had to go through. Of course, I didn't see it but I understand there was quite an extensive size to them and there were just thousands and thousands of documents there. By night before last the four accountants that we had in the Mayflower Distributing Company and the Paster Distributing Company, at Mr. Paster's place of business, had narrowed it down to one post office truckful, I imagine three or four hundred pounds.

Since that time we have been working night and day. We were here until about midnight last night, trying to digest those. There are a number of documents that are missing and we have to reconstruct from other documents what the missing documents are. The remaining witnesses I have, I think it's necessary that I have the complete analysis of those records before I'm able to examine those witnesses properly. There are things that are coming out that didn't come out in the last trial. An example of that, of course, is Mr. Baeder's testimony and we will have other instances like that, at least one other that I know of right now.

Because of the delay in getting the records and because of the fact that we haven't been able to fully examine them, I will ask that we recess for one day and I think we will be able to go ahead. We will go forward on Friday and I hope that we will be completely prepared to finish on Friday. Now, since I did have hopes of completing the trial on Friday and since I have spoken to your Honor, there have been more developments which will probably cause us to call a couple more witnesses than we hadn't anticipated. I have probably twelve or fourteen witnesses on call but I don't intend to call them, the majority of them, and I am a little afraid now that we won't finish on Friday, but we are doing everything we can to do it.

The delay of a day now would also save us time because in the present posture of the case and in the examination, we would have to take all these documents into court and go through them one at a time, where when we finish analyzing them we'll be able to have an accountant testify from a summary. Of course, we'll bring the records in.

The Court: Do you gentlemen have anything to say with reference to the Government's request?

Mr. Bangs: I haven't.

Mr. Murphy: I have no objection, your Honor, to their having the time they want to prepare.

The Court: Well, it seems to the Court that the request of the Government is reasonable and it will be granted. We will delay the presentation of testimony to the jury until tomorrow morning at ten o'clock.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Criminal No. 8158

UNITED STATES OF AMERICA,

Plaintiff

vs.

ELMO T. CHRISTIANSON and HERMAN PASTER;

Defendants

ORDER

Upon the motion of Mr. Oliver Dibble, Special Assistant to the United States Attorney, that the trial of the above entitled action be recessed for one day and until April 9, 1954, and there being no objection on the part of the attorneys for the above named defendants, now, therefore, it is

ORDERED that said motion be, and the same hereby is, granted, and the trial of the above entitled action be continued until the 9th day of April, 1954, at 9:30 a.m.

Dated this 8th day of April, A.D. 1954.

/s/ CHARLES J. VOGEL

Judge,

United States District Court.

James Christensen, on behalf of the plaintiff in the Christianson case, testified:

I live in St. Paul, Minnesota * * * and work for the Automatic Games Supply Company in St. Paul, Minnesota, who are distributors for coin machines, and have been employed by them since June 1, 1953. Prior to June 1, 1953, I was employed by the Mayflower Distributing Company for about six and one-half years as a bookkeeper. * * * I know Herman Paster and Allan Nilva, who is Herman Paster's brother-in-law. As bookkeeper for Mayflower, I kept the cash journal, sales journal, accounts payable, accounts receivable ledger and perpetual inventory records. * * * Four Bells are consoles, also Three Bells, One, Two and Three Mills, Pace Reels, Triple Bells, Wild Lemon, Keeney Two-Way Super Bells, Keeney Two-Way, Keeney Two-Way Super Bell 5 and 25, Keeney Two-Way Super, Keeney Three-Way, Keeney Bonus Super Bell, Double Up, Drawbells, Evans Racers, Multi-Bell, and Bangtails are console slot machines. * * * Prior to January 31, 1951, we kept a separate inventory of console machines but this inventory was discontinued at that time and the machines were commingled with the other machines and carried as pin ball machines. * * * Regular slot machines, the one-armed bandit type, were carried as pin ball machines. * * * Prior to January 31, 1951, we had a separate inventory for slot machines, or one-armed bandits, but that was discontinued on January 31, 1951. After that they were carried as pin balls. I changed these inventories on instruction from Mr. Johnson, and also an officer of the corporation. * * * American Eagle is a slot machine. Also Black Beauty is a slot machine, Black Cherry 5¢, 10¢, 25¢ and 50¢, Black Gold, Black Hawk, Blue & Gold, Blue Bells, Blue Fronts, Bonus Bronze Chief, Bonus Bell; Brown Front, Buddy, Cherry Bell, Chief High Head, Chief 5¢, Chief 10¢, Chief 25¢, Chief Console, Chrome Bell Original, Chrome Front 5¢ & 10¢, Club Chief, Club Special Chief, Columbia 1¢, Columbia 5¢, Columbia 10¢, Console Bell, Copper Bell, Dark Cherry, Dark Cherry 25¢, Deluxe Bell, Dixie 5¢, Dixie 10¢, Extra Bells, Extra Bells 25¢, Futility, Gold Chrome, Golden Falls 25¢, Goose Neck 1¢, Goose Neck 5¢, Goose Neck 25¢, Grey Hawk, Grey Hawk Chief 5¢, Gusher, Jewel Bell, Master Chief, Melon Bell, Mystery Bonus, Pace Chrome, Pace Comic 1¢, Pace Comic 10¢, Pace Console 5¢, Pace Deluxe, Pace De-

luxe 25¢, Prospector Chief, Q.T. 1¢, Redskins 5¢, Roll-a-Top 1¢, Roll-a-Top 10¢, Silver Chief 5¢, Silver Noon Club, Standard Chief, Sun Chief, Tick-Tack-Toe, Token Bell, Treasury 1¢, Twin Falls, Victory 25¢, Victory 5¢, Yellow Chrome, Yellow Front, are also slot machines * * *. When we refer to bells, that means slot machines.

Government Exhibit No. 94 (ledger sheet of Mayflower Distributing Company covering the account of Robert Sande from November 21, 1950 to December 27, 1950) is not complete. Just prior to the first Christianson trial I received instructions from Allan Nilva, who was vice president and business adviser for Mayflower, to withdraw certain invoices and replace them with slips of paper. * * *

Government Exhibit No. 52 (ledger sheet of Mayflower Distributing Company covering the account of Stanley Baeder) was prepared by me under instructions from Allan Nilva, just prior to the first Christianson trial, but is not a true copy of Stanley Baeder's account because the invoice covering four triple bells that were purchased by Baeder in January were not put on this account. This exhibit shows that Mr. Baeder had a balance of \$1,100.00 due him, but actually there was no money due him.

This witness was not cross-examined.

(From pages 201-2 of Transcript of Testimony in U. S. v. Christianson, et al:)

James L. Brastrup, named as a co-conspirator but not as a defendant in U. S. v. Christianson, et al, testified on behalf of plaintiff in that case:

I had a conversation with Mr. Paster (defendant) * * * Elmo (Christianson, defendant) and Paster and I were to operate machines in the clubs in the State that were not to be handled by the machine operators. * * * They would belong 50% to us and to Herman Paster and that Christianson was to get 10% of the money that came from the various operators in the state, and that Elmo's (Christianson's) brother-in-law, Howard Hartje, was to make the repairs and he was to come down to Minneapolis and St. Paul and go through this repair shop and learn how to repair those machines so that if something went wrong with them that he could be out there fixing them up right away. * * *

(Pages 266-8:)

Hartje and I went to Minneapolis * * * we saw Mr. Paster and Mr. Nilva and I introduced Hartje to them and explained to them what he was down there for * * *.

(From pages 730-737 of the Transcript of Testimony in U. S. v. Christianson, et al:)

Howard L. Hartje, on behalf of plaintiff in U. S. v. Christianson, et al, testified:

* * * I went to Minneapolis, to the Mayflower Distributing Company with Mr. Brastrup * * * he introduced me to Mr. Allan Nilva * * *.

(From pages 1320-6 of Transcript of Testimony in U. S. v. Christianson, et al:)

Don Slominsky, on behalf of the defendant Paster in U. S. v. Christianson, et al, testified:

I live in Grand Forks * * * and I am a lube boy, that is grease or lubricating. * * * I worked for Mr. Brastrup from about the first of the year until May, 1951, I think it was. * * * I didn't get to know him good but visited with him from time to time * * * I know his reputation for truth and veracity was very bad and I would not believe him under oath.

CROSS EXAMINATION:

I came down here, about 300 miles, this morning * * * with "the other bunch" * * * five of us. * * * Allan Nilva was down there and he told us to come down * * * he promised to pay us something * * *.

RE-DIRECT EXAMINATION:

I haven't been paid my mileage and witness fees yet and I suppose that's what I'm going to get * * *.

RE-CROSS EXAMINATION:

Nilva promised us the wages we lost and that. * * * He didn't promise us any given amount * * * he said he would take good care of us * * *.

(The following is found on pages 1333-1342 of the Transcript of the Record in the Christianson case:)

MORNING SESSION, THURSDAY, APRIL 15, 1954

Pursuant to adjournment as aforesaid, at 9:30 o'clock a.m. of said Thursday, April 15, 1954, the Court met, present and presiding as before, and the following proceedings were had in chambers out of the presence and hearing of the jury:

The Court: Mr. Nilva, you wanted to make a statement to the Court for the record?

Mr. Nilva: Yes, your Honor. I want to state that I have come here voluntarily in response to what I understand was a request of the Court to have me come here. I arrived last night after first notifying both Mr. Murphy—and I think Mr. Eaton was notified by telephone the night prior that I was coming, and I was served with a subpoena last night, but that was entirely unnecessary because I would be willing to come to the Court at any time. It is a voluntary matter.

The Court: Very well. Mr. Nilva, the Court is ordering that you not leave the jurisdiction of this Court without the Court's permission.

Mr. Nilva: I will be pleased to comply with the order of the Court.

The Court: Mr. Dibble, did you want to examine Mr. Nilva?

Mr. Dibble: Yes, sir, just very shortly. Mr. Nilva, you appeared here and have been sworn previously, haven't you?

Mr. Nilva: Yes, I have, sir.

Mr. Dibble: At that time were you asked and did you testify that you were vice president of the Mayflower Distributing Company at that time?

Mr. Nilva: That's right.

Mr. Dibble: You were asked the question, "Do you appear here in answer to the subpoena that was issued by the Government?" And you said, "Yes, I do," is that right?

Mr. Nilva: I believe the situation—

Mr. Dibble: (Interrupting) Can you answer the question? Did you?

Mr. Nilva: I would like to explain that.

Mr. Dibble: Would you like to read the transcript?

Mr. Nilva: No, but I would like to explain it, Mr. Dibble, if I may. The subpoena was served on Mr. Johnson and I believe the records will indicate the return of the Marshal indicated that. However, Mr. Johnson came here for the trial. I was left behind. I made search of certain records and when I came here I think you asked me, "Do you want to assume the responsibility of service of the subpoena," or words to that effect and I said yes, I would. Those are the facts.

Mr. Dibble: I will ask you again, Mr. Nilva: Were you asked in chambers the last time when you were under oath—were you asked this question: "Do you appear here in answer to the subpoena that was issued by the Government to produce the records, the many subpoenas that were issued?" And did you make this answer: "Yes, I do"?

Mr. Nilva: I believe I—

Mr. Dibble: (Interrupting) Can you answer that "yes" or "no"?

Mr. Nilva: I did, yes, Mr. Dibble.

Mr. Dibble: That's all.

Mr. Nilva: I did, but I do want to add the qualification of my statement, which I think is pertinent.

Mr. Dibble: And were you asked the question: "And have you brought all the records that you could that those subpoenas asked for?" And did you say, "Yes, I have"?

Mr. Nilva: I don't believe I said yes, I have. However, if the record so indicates, I know that I made other qualifying and explaining answers.

Mr. Dibble: Now, have you been excused from service of this Court since that time?

Mr. Nilva: Excused from service?

Mr. Dibble: Have you been excused from the Court at this time, from this trial?

Mr. Nilva: No, there was no formal excuse.

Mr. Dibble: Will you produce those records that you say you brought?

Mr. Nilva: Well, I know that I turned them over to Mr. Johnson. Mr. Johnson brought them over to your office, Mr. Dibble, and the balance of the records I understand are in the possession of Mr. Paster.

Mr. Dibble: Will you turn over the records that you brought?

Mr. Nilva: Well, those that I brought, Mr. Dibble, I understand that a large number of those records you took, you or Mr. Mills took at the time. Those included all the new purchases from the Bally Company. Certainly.

Mr. Dibble: Do you still have the records that you produced upstairs for our examination?

Mr. Nilva: I personally don't have them, Mr. Dibble. Now, a large number of those records—

Mr. Dibble: (Interrupting) Can you produce them, Mr. Nilva?

Mr. Nilva: Well, can I? I understand that Mr. Paster has them now. When I left, Mr. Johnson and Mr. Paster had them. He must have taken the Bally records. He took the checks issued to Bally. There were records, certainly; he had them.

Mr. Dibble: Mr. Nilva, will you produce the records that you brought here in answer to the subpoena? Can we have those, please?

Mr. Nilva: Well, I haven't them with me at the present time, Mr. Dibble.

Mr. Dibble: Would you get them for us?

Mr. Nilva: I will endeavor to get them. But I should—I'd like to explain to the Court what happened to those records. Now, Mr. Dibble, you know that you got all the records of the Bally Manufacturing Company. You know you got all the checks for new purchases. You also know that there were many records there in relation to Sande. I understood that that was the most important thing you wanted. There were several bills of lading on Sande that were turned over to you people, and there were records of purchases, invoices and bills of lading and ledger sheets on many others. They were there. There was a whole file of them.

Mr. Dibble: Now, Mr. Nilva, will you please produce the records that you brought in answer to the subpoena that you said you were appearing here in answer to that subpoena? There is no difficulty with that question.

Mr. Nilva: I understand, Mr. Dibble, I want you to be fair with me. At the time that you examined me the last time—I want to state in explanation what records I brought here.

You didn't even give me that opportunity at that time and I think the record will so indicate.

Mr. Dibble: We just want to see the records, if the Court please. If the Court please, we are now asking your Honor to order him to produce the records that he said he appeared here with at the last time.

The Court: You are to produce them. If you need time to go upstairs and get them, very well.

Mr. Nilva: I would like to ask a question. What about all the records with reference to the Bally Manufacturing and all the checks?

The Court: Mr. Dibble is referring only to the records that you said you brought here in answer to the subpoena.

Mr. Nilva: I brought those records, your Honor, and those were turned over. Now, if I can have one of their gentlemen work with me, I'll be glad to go through their records and select out what I did bring.

Mr. Dibble: The records were not turned over. They were brought upstairs for our inspection and Mr. Johnson stayed there with them and Mr. Johnson took them when he left and those are the records that Mr. Nilva said that he was here to produce. We have a list of them. We know which records they are. We are asking him now to produce them.

Mr. Nilva: I merely would like to ask this: Do you have the Bally records that I brought?

Mr. Dibble: We don't have any of the records that you brought.

Mr. Nilva: Do you have the checks that I brought?

The Court: Mr. Dibble just stated that he did not have any of the records that you brought. He apparently has the records impounded by the Court.

Mr. Nilva: Unfortunately, Mr. Johnson left last night. This leaves me in a peculiar predicament. If I had known just exactly what you wanted, I would be glad to cooperate, your Honor, and live up to the order of the Court to the best of my ability. I will do my very best, your Honor.

The Court: Do you have any idea where the records are that are referred to by the witness?

Mr. Dibble: No, your Honor.

The Court: You don't have?

Mr. Dibble: They produced them upstairs and we examined them and we made a record of them. Mr. Peterson has a record of the records that they produced at that time.

The Court: They are the records brought by Mr. Nilva?

Mr. Dibble: Yes, your Honor.

The Court: Then they were taken by Mr. Johnson?

Mr. Dibble: Mr. Johnson took them.

Mr. Nilva: I merely would like to ask about the Bally records. I made an extensive search on those records. It took me a long time to find them. Those were turned over, together with all the checks. I haven't seen them, your Honor, since I turned them over to Mr. Johnson and I'd be very happy to assist in every way to comply with the order of the Court.

The Court: Mr. Nilva, you are ordered to comply with the request of the Government to produce the records that you brought here in answer to the subpoenas. We will give you until two o'clock this afternoon to do so.

Mr. Nilva: Can I have the assistance of one of the gentlemen?

The Court: Certainly. Talk to Mr. Peterson or anybody you wish.

Mr. Nilva: All right, your Honor.

The Court: Do we have anything further in connection with this matter?

Mr. Murphy: Just this, your Honor.

The Court: Mr. Murphy?

Mr. Murphy: Mr. Hoffman, who is representing Mr. Nilva in this matter here, whatever the proceeding is, I don't know, but he called me last night and he wanted to know what the nature of the proceeding was and so forth, and I told him that I couldn't tell him definitely, that he should be here. He told me that he was in court and that he would not be able to be here until Monday and that if any action is to be taken or any proceedings instituted he would like to have an opportunity to examine the record first.

The Court: He will have that opportunity.

Mr. Nilva: I want to state this. I am not going to raise any technical objections. I want to cooperate with the Court and with Mr. Dibble to the fullest extent. I am not looking for any legal technicalities or to assert any.

Mr. Murphy: I don't think so.

Mr. Nilva: I don't need any lawyer to represent me. Certainly, I asked advice of Mr. Hoffman, who is a very dear friend of mine. I also asked advice of Tom Sullivan, who is a very dear friend of mine. But I am not looking forward to raising any legal or technical objections and I will be glad to answer any questions put to me by the Court or by Mr. Dibble.

The Court: Well, for the present, the only thing is that the Court has ordered you to remain within ~~the jurisdiction~~ of the Court and not to leave without permission.

Mr. Nilva: I certainly will, your Honor.

Mr. Murphy: Now, your Honor, these proceedings are to remain without any publicity and kept within the confines of this room?

The Court: I hope no one in this room will report anything with reference to it so it might possibly get in the paper and get before the jury. That's what I am very much concerned with. I ask that everyone here not make mention of the present order.

The following are excerpts from the transcript of the proceedings on the Order To Show Cause directed to Allan L. Nilva.

The Court: Very well, do you have any re-direct examination?

Mr. Graff: I have no further questions.

The Court: That is all, Mr. Nilva.

(Witness excused.)

Mr. Graff: We have no further testimony, your Honor, or exhibits.

The Court: Do you gentlemen wish to present any argument to the Court?

Mr. Graff: I would like to have a few minutes, your Honor, if I may.

The Court: I would be glad to hear you, Mr. Graff.

The Court: His record is not quite so unblemished as your statement would indicate, Mr. Graff. He was a defendant in this case a year ago.

Mr. Graff: That is right.

The Court: Had he been a defendant in the case as it was tried this time, I don't think he would have been so fortunate.

* * * * *

Mr. Dibble: There is also an indication in the record by the witness the ex-bookkeeper that the records that were destroyed were destroyed at Mr. Nilva's instructions and that testimony was never questioned.

The Court: Were you apprised of that testimony, Mr. Graff?

Mr. Graff: I read the testimony of Mr. Christensen, your Honor, and there is a perfectly, I think valid—I wouldn't say valid, there is a rational explanation of it. I don't think that it concerns that Baeder ledger sheet. Is that the point of the Christensen testimony?

Mr. Dibble: I can't recall which one it was; it was either that or Sande.

The Court: I can't recall the name of the purchaser.

Mr. Dibble: It was both, your Honor.

The Court: Both Sande and Baeder?

Mr. Dibble: Yes, your Honor.

* * * * *

The Court: There remains in my mind no question at all with reference to the respondent's guilt in so far as these charges are concerned, Mr. Graff. In addition thereto, he is an attorney. He did obstruct the administration of justice in the trial of that case that necessitated this Court ordering the impounding of the records of the Mayflower Distributing Company, and as a result of those records having been impounded and guards having been kept there twenty-four hours a day and their search by auditors or members of the F.B.I., records were produced which were not produced a year ago at the trial of the case but did assist in the prosecution of the case here and the conviction of the other two defendants, or at least did assist in connection with Mr. Paster.

* * * * *

The Court: He is a member of the bar, an officer of the courts of the State of Minnesota and the Federal Courts there and was given the privilege and the courtesy of appearing as an attorney before this Court.

Criminal No. 8158

UNITED STATES OF AMERICA,

Plaintiff

vs.

ELMO T. CHRISTIANSON and HERMAN PASTER,
Defendants

UNITED STATES OF AMERICA)

) ss.

DISTRICT OF NORTH DAKOTA)

I, Beatrice A. McMichael, Clerk of the United States Court for the District of North Dakota, do hereby certify that the following is a list of the witnesses who testified in the first trial of the above-entitled action, said trial commencing on March 18, 1953 and the jury returning a verdict on April 8, 1953, as shown by the minutes of this Court:

Plaintiff's Witnesses

- James L. Brastrup
- Walter D. Johnson
- Homer D. Dixon
- William Fenwick
- Donna Schindler
- Leslie Long
- Michael Weiss, Jr.
- Samuel G. Nilva
- Doris Dolva
- Gerald Anderson
- Burnie R. Couch
- Robert Sande
- Francis William Schoefter

Defendant's Witnesses

- Joseph Travnicek
- Howard T. Ahlgren
- Palma Langan
- Casper Kopp
- Wilbur Blair
- Herman R. Paster
- Allan I. Nilva
- Roy E. Hilton
- Horace R. Hansen
- Richard E. Kyle
- Rev. Egill Fafnis
- William Halldorson
- A. J. Jensen
- V. E. Fenelon

Paul Vogel
 Jack W. Backus
 Freeman Anderson
Stanley Baeder
 Cyrus Bechtel
 E. A. Moll
 Cyril Hennennsent
 Gordon Benson
 Paul M. Chapman
 Gerald Boren
 Isadore LaFleur, Jr.
 George F. Binek
 D. C. Kierland
 Miss Clara Pfenning
 Jay Costello
 A. R. Jongewaard
 Clyde W. Pasch
 Alex Wolf
 Anton (Tony) Binek
 Neil Van Berkum
 Howard L. Knudson
 Lee F. Brooks

Howard Hartje
 George S. Register
 Michael J. Galvin
 Robert J. Tansey
 C. J. Myers
 Paul Sand
 A. J. Gerlach
 John Snydal
 M. J. Baumgartner
 Robert Vogel
 Douglas Heen
 Henry Kennedy
 Elmo T. Christianson
 Mrs. Bernice Christianson

IN TESTIMONY WHEREOF I have hereunto
 set my hand and seal of this Court, this 21st
 day of March, A.D. 1955.

Beatrice A. McMichael

(SEAL)

Clerk, United States District Court

(Caption)

In re: ALLAN L. NILVA

Criminal No. 8320

The respondent was represented by Mr. John W. Graff, of
 the firm of Hoffman, Donahue and Graff, of St. Paul, Minne-
 sota. At the direction of the Court, Mr. Oliver Dibble, Special
 Assistant to the United States Attorney, of Washington,
 D. C., appeared on behalf of the Court.

MEMORANDUM OPINION

Allan I. Nilva, attorney, business man, resident of St. Paul, Minnesota, was proceeded against for criminal contempt under Rule 42(b) of the Federal Rules of Criminal Procedure. He was found guilty, first, of giving false and evasive testimony under oath on April 1, 1954, in connection with the trial of the case of U. S. v. Elmo T. Christianson and Herman Paster; second, disobedience to subpoena duces tecum No. 78 directed to the Mayflower Distributing Company, of which he was vice president, and which subpoena was issued in connection with the trial of the case of U. S. v. Elmo T. Christianson and Herman Paster; and, third, of disobedience to subpoena duces tecum No. 160 directed to the Mayflower Distributing Company in connection with the same trial.

The two subpoenas referred to above were issued out of this court and served upon the Mayflower Distributing Company. Nilva, as a nominal vice president of the Mayflower Distributing Company, voluntarily appeared in this court during the trial of U. S. v. Christianson, et al, at Bismarck, North Dakota, on April 1, 1954, stating that he was there in response to such subpoenas. Subsequently he testified under oath with reference to the existence or non-existence or possession of certain records required by the subpoenas so issued.

As a result of Nilva's evasive testimony on April 1, 1954, this Court found it necessary to impound the records of the Mayflower Distributing Company and cause them to be brought from St. Paul, Minnesota, to Bismarck, North Dakota, for use in the trial of the case of U. S. v. Christianson, et al. Upon the production of the records through impounding thereof by the United States Marshal, it being apparent that Nilva's testimony was evasive or false, or both; the Court ordered Nilva not to leave the jurisdiction of the Court without permission.

Action on the matter was deferred until after the jury verdict in the case of U. S. v. Christianson, et al, because it was the Court's desire that the jury should not learn of the affair during the trial, so that the defendants therein would not be prejudiced by it in any way. There was no doubt that the jurors were not only aware of Nilva's close connection

with one of the defendants but also, due to widespread public interest in the trial, were aware of the fact that Nilva had at one time been a co-defendant in the case and had been found not guilty in a previous trial thereof.

Subsequent to the receipt of the jury verdict in U. S. v. Christianson, et al., Nilva was proceeded against under Paragraph (b) of Rule 42 of the Federal Rules of Criminal Procedure through the issuance of an Order to Show Cause why he should not be found guilty of criminal contempt of this Court. At the trial, Nilva was found guilty and was sentenced by the Court to be confined for a period of one year and one day. After the imposition of sentence, Nilva and his attorney asked that the Court stay execution of the sentence and place Nilva on probation. A total stay of 40 days was given within which the Court could consider Nilva's petition for probation. Since that time, lengthy reports have been presented to the Court by the United States Probation Offices of the District of Minnesota and of the District of North Dakota and many letters have been received by the Probation Officers and by the Court from prominent citizens, asking or suggesting leniency in behalf of Nilva. These have now been considered by the Court and the Court, in addition thereto, has reviewed a complete transcript of all proceedings in which Nilva testified and in which the impounded records, not produced by Nilva, were explained and their importance to the case of U. S. v. Christianson, et al, ascertained.

There is no question in the Court's mind as to Nilva's guilt. He gave false and evasive testimony under oath and voluntarily disobeyed subpoenas No. 78 and No. 160 on the Mayflower Distributing Company, of which he was the vice president and for whom, he appeared in Court in response to such subpoenas. That Nilva's actions impeded the administration of justice in the trial of the case of U. S. v. Christianson, et al., is patent from the fact that it became necessary to expend time and expense to impound the records pursuant to the Court's order. The records which he was required to produce were necessary and vital to the trial of U. S. v. Christianson, et al. The only question, then, remaining before this Court is whether Nilva should be confined or if the Court, in the exercise of its discretion, should stay execution of the sentence and place him on probation.

It seems apparent from the record that this is Nilva's first conviction of a criminal offense. The Court is cognizant of the fact that many laymen convicted of a first offense are placed on probation, thus receiving the leniency that either ignorance or youth or inexperience might justify. We have here, however, an attorney at law. While not a member of the bar of this court, he was extended the privilege and courtesy of appearing of counsel in the case of U. S. v. Christianson, et al. He violated the very foundation of a court officer's oath in what he did. An attorney who violates his oath and who is disobedient to the orders of the Court strikes at the very roots of our court system and damages the general repute of the legal profession. To thus condone by too great leniency a violation so flagrant would not be the administration of justice. It has been ordered that Nilva may never again appear as an attorney in the United States District Court for the District of North Dakota. This Court has no jurisdiction over him elsewhere and expresses no opinion as to what will happen to his right to practice law elsewhere.

This Court is of the opinion that the sentence imposed was a proper and a just one. The petition that the execution of sentence be stayed and that he be granted probation accordingly will be denied and Nilva is ordered to present himself to the United States Marshal for the District of North Dakota at Fargo, North Dakota, on the 7th day of June, 1954; for commencement of service of the sentence heretofore imposed.

IT WILL BE SO ORDERED.

Dated this 3rd day of June, A.D. 1954, at Fargo, North Dakota.

CHARLES J. VOGEL
Judge, United States District Court.

LIST OF EXHIBITS

RESPONDENT'S:

1—General ledger: Assets and liabilities
 Income and expense accounts
 (which contains)

A. Holly Sales Co.

- (1) General Journal 3/31/50—1/31/51
- (2) General Ledger 2/1/50—1/31/51

B. Paster Distributing Co.

- (1) General Journal 2/1/50—1/31/51
- (2) General Ledger 2/1/50—1/31/51

C. Mayflower—St. Paul

- (1) General Journal 2/1/50—1/31/51
- (2) General Ledger 2/1/50—1/31/51

Records indicate that "Sales—Bells New" (Slot Machines) made as follows:

February 1950	\$ 220.00
October 1950	650.00
December 1950	3,631.00
January 1951	9,000.00
total \$13,501.00	

Sales—Bells used (slot machines)

February 1950	\$ 848.00
March 1950	415.00
April 1950	188.50
May 1950	570.00
June 1950	350.00
July 1950	1,249.00
August 1950	3,160.00
September 1950	2,125.00
October 1950	(1,140.00)
November 1950	625.00
December 1950	14,104.00
January 1951	50,005.00

total \$72,499.50

The records further indicate that the following purchases were made:

"Purchases—Bells New" (slot machines)

March 1950	\$ 900.00
May 1950	3,176.00
	total \$ 4,076.00

"Purchases—Bells used" (slot machines)

March 1950	\$ 175.00
" 1950	(5.00)
May 1950	9.00
August 1950	320.00
" 1950	400.00
" 1950	980.00
September 1950	990.00
" 1950	315.00
" 1950	(80.00)
November 1950	100.00
December 1950	10,620.00
January 1951	965.00
" 1951	3,815.00
" 1951	7,180.00
	total \$25,784.00

D. Mayflower—Omaha

- (1) General Journal 2/1/50—1/31/51
- (2) General Ledger 2/1/50—1/31/51

E. Paster—Milwaukee

- (1) General Journal 2/1/50—1/31/51
- (2) General Ledger 2/1/50—1/31/51

F. Paster—Enterprises

- (1) General Journal 7/1/46—12/31/50
- (2) Cash Journal 12/11/45—12/26/50
- (3) General Ledger 5/1/46—12/31/50
 - (a) Assets
 - (b) Liabilities
 - (c) Income
 - (d) Expense
- (4) Accounts Receivable

2—Ledger containing:

A. Mayflower—Omaha

- (1) General Journal 2/1/51—1/31/52

- (2) General Ledger 2/1/51—1/31/52
- B. Paster—Milwaukee
 - (1) Cash Journal 2/1/51—1/31/52
 - (2) General Journal 2/1/51—1/31/52
 - (3) General Ledger 2/1/51—1/31/52
- C. Paster—St. Paul
 - (1) General Journal 2/1/51—1/31/52
 - (2) General Ledger 2/1/51—1/31/52
- D. Holly Sales Co.
 - (1) General Journal 2/1/51—1/31/52
 - (2) General Ledger 2/1/51—1/31/52
- E. Mayflower—St. Paul
 - (1) General Journal 3/31/51—1/31/52
 - (2) General Ledger 2/1/51—1/31/52

3—Journal: Mayflower—St. Paul, from February 1, 1946 to January 31, 1953.

The primary contents in this journal reflect individual sales and cash receipt transactions:

The details include, among other things, the following account headings:

1. Date of the transaction
2. Customers account
3. Cash received
4. Accounts Receivable
5. Sales
 - (a) Services
 - (b) New and used machines
 - (c) New and used Bells (slot machines)
 - (d) Drink vendors
6. Trade-in allowance data.

Summary of each individual account heading is posted each month by monetary amount to Respondent's Exhibit No. 1, and reflect most all of the details in accounts captioned "Sales—Bells New" (Slot machines) "Sales—Bells used" and "Purchases — Bells used" (Slot machines).

4—Check Register: Mayflower—St. Paul, from July 1, 1946, to January 31, 1955.

The primary contents in this register reflect the running

bank balance and individual expenditures made by check broken down as to the nature of expense.

The details include among other things, the following account headings:

1. Bank deposits and balance.
2. Name of Payee.
3. Date, number and amount of check.
4. Breakdown or distribution of the expenditure by type of expense including purchases of parts, machines and bells (slot machines).

The sum of the individual daily transactions is posted in total each month to each account affected in Respondent's Exhibit No. 1, and reflect part of the amount in the captioned "Purchases—Bells used" (slot machines).

5—Folder headed Neil Van Berkum containing:

- A. 2 conditional sales contracts dated 11/21/50 and 4/23/51 covering the sale of pin ball machines and phonographs, by Mayflower Distributing Company.
- B. 34 invoices of Mayflower Distributing Co. for sale of 67 pin ball machines between 6/19/50 and 12/29/50.
- C. 1 invoice of Paster Distributing Co. dated 4/23/51 for sales of 5 cigarette vendors.

6—Folder headed I. F. LaFleur containing:

- A. 3 invoices of Mayflower Distributing Co. for sale of 4 pin ball machines and 2 bowlers between 5/10/50 and 12/5/50.
- B. 1 invoice of Holly Sales Co. dated 1/10/51 for 30 stuffed dolls.
- C. 1 memo copy of Bill of Lading dated 12/8/50 for shipment of 3 cartons premiums by Holly Sales Co.

7—Folder headed North Dakota Sales; J. W. Stearns, containing:

- A. Accounts Receivable ledger sheet for period 11/2/49 to 5/2/51.
- B. Conditional Sales Contract dated 11/21/50 for sales of 4 AM1 Phonographs by Paster Distributing Co.
- C. 1 invoice, dated 11/30/50 for sale of 4 AM1 Phonographs by Paster Distributing Co.

- D. 2 parts invoices of Paster Distributing Co. dated 12/18/50 and 3/26/51.
- E. 2 Credit Memoranda by Paster Distributing Co. dated 2/13/51 and 5/3/51 for return of parts.
- F. Correspondence of Paster Distributing Co. dated 12/4/50 to discount and to record Conditional Sales Contract dated 11/21/50.

8—Folder headed Bob Sande containing:

- A. Conditional Sales Contract dated 11/21/50 for sale of 7 Bangtail and 7 Evans Racers machines and 16 pin ball machines by Mayflower Distributing Co.
- B. 8 invoices of Mayflower Distributing Co. for sale of 4 Evans Racers and 1 Bangtail machines and 10 pin ball machines by Mayflower Distributing Co. between 11/27/50 and 12/26/50.

Data re: Sales of Racers and Bangtails:

Inv. No.	Inv. date	Quantity	Item
3716B	12/14/50	1	Evans Racers
3740B	12/15/50	1	Bangtail
3745B	12/15/50	2	Evans Racers
3815B	12/26/50	1	Evans Racers

9—Folder headed B. R. Couch containing:

- A. 2 invoices of Mayflower Distributing Co. dated 5/9/51 and 7/19/51 for sale of 2 pin ball machines.
- B. 1 Credit Memo of Mayflower Distributing Co. dated 11/30/50 for return of part for bowler.
- C. 2 invoices of Paster Distributing Co. dated 7/19/51 and 7/26/51 for sale of 1 United 6-Player and 1 Shuffle Line.
- D. 4 Miscellaneous Bills of Lading, 2 for Mayflower and 2 for Paster, covering shipment of coin operated vendors and amusement games.

10—Folder headed Knudson containing:

- A. 6 invoices of Mayflower Distributing Co. for sale of 3 pin ball machines, 2 shuffle alleys and 1 bowler between 11/9/50 and 8/2/51.
- B. 2 Credit Memoranda of Mayflower Distributing Co. dated 11/8/50 and 12/19/50 for return by H. L. Knudson for 1 bowler and 2 shuffle alleys.

- C. 1 invoice of Paster Distributing Co. dated 7/31/51 for sale of 1 phonograph.
- D. 2 Parts invoices of Mayflower Distributing Co. dated 6/12/51 and 7/10/51.
- E. 2 invoices of Paster Distributing Co. dated 1/5/51 and 7/10/51 for sale of records and needles.

11—Folder headed Jack Backus containing:

- A. Accounts Receivable ledger sheet captioned Jack Backus covering period of 10/14/49 to 11/27/50.
- B. 3 invoices of Mayflower Distributing Co. for sale of 1 pin ball machine and 3 cigarette vendors with change-maker from 7/17/50 to 10/31/50. 2 invoices are billed to Dave's Distributing Co. but shipment was made to Jack Backus.
- C. 1 invoice of Dave's Distributing Co. dated 7/16/51 for 2 cigarette vendors.
- D. 1 copy Bill of Lading dated 7/14/50 for shipment of 1 carton novelties from Holly Sales Co.

12—Folder headed Robert Aherin containing:

- A. Accounts Receivable ledger sheet captioned Robert Aherin covering period from 5/8/50 to 4/20/51.
- B. 3 invoices of Mayflower Distributing Co. for sale of 2 shuffle alleys and 2 cigarette vendors from 1/2/51 to 3/28/51.
- C. 3 Credit Memoranda of Mayflower Distributing Co. for return of 1 shuffle alley, 1 bowler and credit for freight from 4/12/51 to 4/29/51.

13—Folder headed Stanley Baeder containing:

- A. 8 invoices (7 from 5/8/50 to 12/22/50 and 1 dated 4/16/51) of Mayflower Distributing Co. for sale of 20 bowlers, 7 conversion units, 1 shuffle alley, 3 pin ball machines and 5 cigarette vendors.
- B. 2 invoices of Paster Distributing Co. dated 6/1/51 and 6/4/51 for sale of 2 phonographs.
- C. Chattel Mortgage date 6/1/51 in the amount of \$9,745.00 assigns 9 phonographs and 7 cigarette machines to Mayflower Co.
- D. Letter dated 6/5/51 of Mayflower Distributing Co. to record above chattel mortgage.

14—Folder, not labeled, containing:

- A. 1 invoice of Mayflower Distributing Co. dated 12/1/50 for sale of 4 new Clover Bell machines to Southern Automatic Music Co., Louisville, Ky., and shipped to Fort Wayne, Indiana.
- B. 6 invoices of Mayflower Distributing Co. for sale of 22 Clover Bells, 24 Triple Draw Bell and 20 pin ball machines to World Wide Distributing Co., Chicago, Illinois.
- C. 73 invoices of Bally Manufacturing Co., Chicago, Illinois, for sale to Mayflower Distributing Co. of
 - 51 Clover Bells
 - 27 Triple Draw Bells
 - 50 Grandstands (Automatic payoff pin. balls)
 - 30 Shuffle Champs
 - 228 Hook Bowlers
 - 838 Pin Ball Machines
 between 6/2/50 and 2/23/51.
- D. 4 Credit Memoranda of Bally Manufacturing Co. for period 3/26/51 to 4/26/51 for return of 3 Hook Bowlers and 5 pin ball machines by Mayflower Distributing Co.
- E. 28 cancelled checks of Mayflower Distributing Co. between 6/22/50 and 2/28/51 for purchase of merchandise from Bally Manufacturing Co. (26 checks are payable to Bally and 2 are payable to Herman Paster.)

* * * * *

Data re: sale of Machines by Mayflower
Southern Automatic Music Co.

Inv. No.	Inv. date	Quantity	Item
3603B	12/1/50	4	New Clover Bell

World Wide Distributing Co.

Inv. No.	Inv. date	Quantity	Item
3462B	11/16/50	2	Clover Bell
3723B	12/14/50	4	Triple Draw Bell
3724B	12/14/50	20	Clover Bell
3804B	12/22/50	8	Triple Draw Bell
3809B	12/22/50	11	Triple Draw Bell
3853B	12/28/50	1	Triple Draw Bell

Data re: purchase of machines by Mayflower from Bally

Inv. No.	Inv. date	Quantity	Item
1026	9/1/50	30	Grandstands
1080	9/20/50	50	Clover Bell
1258	10/20/50	1	Triple Draw Bell
1259	10/20/50	1	Triple Draw Bell
1634	12/12/50	18	Triple Draw Bell
1635	12/13/50	7	Triple Draw Bell
1792	12/29/50	1	Clover Bell
1793	12/29/50	20	Grandstand

15—Folder, not labeled, containing:

A. Correspondence between Mayflower Distributing Co., and the Department of Justice in regard to registration and filing of inventories of slot machines and parts in compliance with Public Law #906 beginning 6/4/51 and ending 10/8/52.

THE FOLLOWING IS A DESCRIPTION OF VARIOUS DOCUMENTS FOUND IN THE MAXFLOWER DISTRIBUTING COMPANY RECORDS PRODUCED BY THE UNITED STATES MARSHAL

Incoming Receipt No. 8179.

Incoming Receipt No. 8179 is dated February 26, 1951, and indicates that 7 Citations, tag numbers 1038 through 1044, inclusive, came from Charles City, Iowa, via "S. Nilva," were received by "Bert" and were carried in "Stock."

This incoming receipt has the initials "BC" or "BG" following the numerical figure of 10 or 25 in the "Factory Serial Number" column. According to the testimony of James Christensen, former Mayflower Distributing Co., bookkeeper, the slot machine inventory was carried as pin ball machines subsequent to January 31, 1951, and the initials "BC" or "BG" indicated that the machine was a "Black Cherry" or "Black Gold" type of slot machine (S. R. 36). Therefore, incoming receipt No. 8179 reflects the receipt of 7 slot machines rather than 7 pin ball machines.

Folder marked "Purchase File" contains, among other items:

1. Incoming receipt No. 8043 is dated January 3, 1951, and indicates that eleven slot machines of various types bearing tag numbers 831 through 841, inclusive, came from the Naval Air Station to Mayflower Distributing Co., Inc., via "Sammy," were received by "Bert" and were carried as "Stock." Further notations on the incoming receipt reflect that the machines were paid by check No. 2370.
2. Incoming receipt No. 8049 is dated January 4, 1951, and indicates that 6 slot machines of various types bearing tag numbers 844 through 849 inclusive, came from the Naval Air Station to Mayflower Distributing Co., Inc., via "Sammy," were received by "Bert" and were carried as "Stock." A notation on the incoming receipt indicates that the machines were paid by check No. 2370.

(Check No. 2370, dated December 31, 1950, in the amount of \$300.00 is payable to the Commissioned Officer's Mess and drawn on the Mayflower Distributing Co. account at the Midway National Bank, St. Paul, Minnesota. A notation on the face of the check indicates it to be for "Purchase of 17 Machines." The endorsement is rubber stamped "Pay to the Order of First Minnehaha National Bank, Minneapolis, Minnesota, for deposit only, Commissioned Officer's Mess (open) U.S.N.A.S., Minneapolis, Minnesota." The clearing house stamp of the First Minnehaha National Bank is dated "February 1, 1951." The Midway National Bank cancellation stamp is dated "2-1-51.")

[Page C-225, line 21 of the Check Register (Respondent's Exhibit No. 4) contains the entry of check #2370 payable to Commissioned Officer's Mess in the amount of \$300.00. The distribution of this check reflects that it was for the purchase of "Used Dells" (slot machines).]

(The individual perpetual inventory sheets for various items purchased from the Commissioned Officer's Mess reflect the tag number of the machine, that the item was received from the Naval Air Station on January 22, 1951, and was purchased by check No. 2370.)

3. Incoming Receipt No. 8087 dated January 12, 1951, reflects that 11 slot machines, of various types bearing tag numbers 895 through 905, inclusive, were received from S. Nilva at the Mayflower Distributing Co., by "Bert" and placed in "Stock."

(Check No. 2428, dated January 11, 1951, in the amount of \$610.00 payable to Sam Nilva is drawn on the Mayflower Distributing Co. account at The Midway National Bank, St. Paul, Minnesota. The check is endorsed for Deposit Only, Sam Nilva; has the clearing stamp of a National Bank, Minneapolis, Minnesota #17-2 dated January 15, 1951, and has the cancellation stamp dated "1-15-51." The face of the check bears the following notation "to reimburse Sam Nilva for checks drawn on Per. Acct. Purchase of Machines in Iowa.")

(Page C-227, line 11 of the check register reflects that the check No. 2428 payable to Sam Nilva in the amount of \$610.00 has been included with the total purchases of Used Bells for the month of January, 1951.)

(The perpetual inventory sheets for "Black Gold" and "Melon Bell" reflect that the receipt of machines as shown on incoming receipt No. 8087 were obtained from "VFW Club" by check No. 2472 on January 11, 1951. The tag numbers are the same as those reflected on the incoming receipt.)

~~Note:~~ Parenthetical matters supplied.

Note:

Following pages of exhibits are not
sequential for best use of frames.

(P.61)

SHEET NO.

ACCOUNT NO.

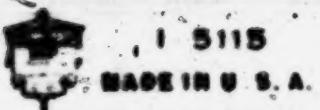
TERMS

RATING

CREDIT LIMIT

NAME

ADDRESS

STANLEY BAEDER
NEW ROCKFORD
NO. DAK.DATE
1950

ITEMS

FOL.

DEBITS

CREDITS

BALANCE

Oct. 13	9/c		J4182-14	101400	- 0 -
123	3186	1 - 4 Player Huf Ally	0345 ² / J4189-2	34500	34500
Nov. 6	9/c		J4200-24	34500	- 0 -
Dec. 5	3622	1 Citation ^c 295 ² /	J4224-26	29500	29500
8	3657	2: ^{Keeney Twin} Bonus ^c 275 ² /	J4227-34	84500	114000
12	3690	2 Triple Bells ^c 275 ² /	J4230-14	55000	169000
13	3710	1 Triple Bell ^c 275 ² /	J4231-14	27500	196500
15	3737	1 Keeney Twin ^c 275 ² /	J4233-24	52500	249000
18	3755	1 Double Up ^c 250 ² /	J4235-2	25000	274000
21	3789	1 Gold Cup ^c 165 ² /	J4237-31	16500	290500
22	3802	1 Gold Cup ^c 165 ² /	J4238-33	16500	307000
27	3829	6 Triple Bell ^c 275 ² /	J4241-8	165000	472000
28	3843	2 Keeney Twins ^c 275 ² /	J4242-13	55000	527000
28	3845	4 Triple Bells ^c 275 ² /	J4242-15	110000	637000
29	3855	1 Double Up ^c 250 ² /	J4243-9	25000	662000
29	3860	5- Keeney Singles ^c 175 ² /	J4243-14	170000	832000

1951

(P.67)

39.5 b

fibers tender

11.11.51

Evans Race

550 "

6163

3968

Robert Sander 11/15/51

2 Evans Rees - rug play @ 5.50

857-858

11.00⁰⁰

(P.65)

SHEET NO.

ACCOUNT NO.

TERMS

NAME

RATING

ADDRESS

CREDIT LIMIT

Robert Sande (DIA. Pioneer 5)

1429 First Ave West.
Williston, No Dakota -I-5113
BANKERS U.S.A.

1958

ITEMS

FOL.

DEBITS

CREDITS

DR.
OR
CR.

BALANCE

Nov 21	a/c Down Payment 1-Champion $\frac{1}{2} 25$ from	J 4218-5		50000	500.00
27	3560 2-citation $\frac{1}{2} 25$ Omaha	J 4218-6	101500		515.00
27	3561 Carrying bags on cont	J 4218-7	758.70		1273.70
28	a/c Cart sale 1-Champion $\frac{1}{2} 25$	J 4218-8		12000	1153.70
28	3564 2-Turf Kings $\frac{1}{2} 50$	J 4218-9	170500		2858.70
28	3574 2-citations $\frac{1}{2} 25$ (from Omaha)	J 4219-8	148500		4343.70
Dec 1	3600 1-Kenney Sup Single C 100.00	J 4222-22	12000		4463.70
5	3640 3-citations C 25.00 from	J 4225-9	88500		5348.70
9	3672 1-Tri-D. Bell C 895.00 Omaha	J 4228-26	89500		6243.70
11	3684 2-Lover's bells C 895.00	J 4229-26	179000		8033.70
13	3703 1-Double Up. C 275.00	J 4231-6	27500		8308.70
13	3715 1-Champion C 425.00 from	J 4231-20	42500		8733.70
14	3716 1-Ev. Racer C 530.00	J 4232-11	55000		9283.70
15	3740 1-Bangtail C 425.00	J 4233-27	42500		9708.70
15	3745 2-Ev. Racer C 530.00 from	J 4233-32	110000		10808.70
20	Progress contract	J 4236-11		13403.70	2595.00

8 3657	9 - Station	$\frac{e}{c} 295 \frac{\alpha}{\alpha}$	94227-34	84500	114000
12 3690	2 Triple Bells	$\frac{e}{c} 215 \frac{\alpha}{\alpha}$	94230-14	55000	169000
13 3710	1 Triple Bell	$\frac{e}{c} 215 \frac{\alpha}{\alpha}$	94231-14	27500	196500
15 3737	2 Keeney Twins	$\frac{e}{c} 275 \frac{\alpha}{\alpha}$	94233-24	52500	249000
	1 Double Up	$\frac{e}{c} 250 \frac{\alpha}{\alpha}$	94235-2	25000	274000
18 3755	1 Double Up	$\frac{e}{c} 250 \frac{\alpha}{\alpha}$	94237-31	16500	290500
21 3789	1 Gold Cup	$\frac{e}{c} 165 \frac{\alpha}{\alpha}$	94238-33	16500	307000
22 3802	1 Gold Cup	$\frac{e}{c} 165 \frac{\alpha}{\alpha}$	94241-8	165000	472000
27 3829	6 Triple Bell	$\frac{e}{c} 215 \frac{\alpha}{\alpha}$	94242-13	55000	527000
28 3843	2 Keeney Twins	$\frac{e}{c} 275 \frac{\alpha}{\alpha}$	94242-15	110000	637000
28 3845	4 Triple Bells	$\frac{e}{c} 215 \frac{\alpha}{\alpha}$	94243-9	25000	662000
29 3855	1 Double Up	$\frac{e}{c} 250 \frac{\alpha}{\alpha}$	94243-14	170000	832000
29 3860	5 Keeney Singles	$\frac{e}{c} 195 \frac{\alpha}{\alpha}$			

1951

Jan 22	9/ -	94260-15	100000	732000	
Mar 3	0/-	94291-19	142000	590000	
April 2	0/-	94309-17	100000	490000	
16 4555	5 Pig Mach Reg.	$\frac{e}{c} 250 \frac{\alpha}{\alpha}$	94318-1	125000	615000
June 11	Progress Contract		94348-9	716500	101500
29 CM1956	Credit on 5 Chargers		94356-34	8500	110000

(P.63)

Jan - 22. 1951. - Inv. # 4057

Stanley Baeder -

4 Triple Bells

[fol. 69] IN UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

No. 15224

ALLEN I. NIIVA, Appellant,

vs.

UNITED STATES OF AMERICA

MOTION OF APPELLANT TO STRIKE CERTAIN PORTIONS OF
SUPPLEMENTARY RECORD, ETC.—Filed August 10, 1955

The above-named appellant respectfully moves the Court as follows:

A. To strike the following from the Supplementary Record which has been served and filed by Appellee in the above captioned matter:

1. The original indictment in the "Christianson case" found on pages 1 to 10 of the Supplementary Record.

2. The modification of the original indictment in the "Christianson case" found on pages 10 to 19 of the Supplementary Record.

3. The proceedings in the first "Christianson case" on April 8, 1953, found on pages 19 to 20 of the Supplementary Record.

4. The proceedings in the second "Christianson case" on April 22, 1954, found on pages 20 and 21 of the Supplementary Record.

5. The motion to quash subpoenas in the second "Christianson case", found on page 21 of the Supplementary Record.

6. The affidavits in support of the motion to quash subpoenas in the second "Christianson case", found on pages 22 to 25 of the Supplementary Record.

7. The order denying the motion to quash subpoenas in the second "Christianson case", found on pages 25 and 26 of the Supplementary Record.

8. Proceedings preliminary to issuance of order for production of records in the second "Christianson

RATING
CREDIT LIMIT

ADDRESS

1429 FIRST AVE
Williston, No Dakota



1-5115

REGISTRATION NO. 2.

1954

ITEMS

FOL. 1

DEBITS

CREDITS

DR.
OR
CR.

BALANCE

Nov 21	a/c Dows Payment 1-Champion @ 25.00 from	J 4218-5		500.00	500.00
27	3560 2- citation @ 25.00 Omaha	J 4218-6	1015.00		515.00
27	3561 Carrying Cycles on Credit	J 4218-7	758.70		1273.70
28	a/c Cart Sale 1-Champion @ 25.00	J 4218-8		1200.00	1153.70
28	3564 2-Turf Kings @ 50.00	J 4218-34	1705.00		2858.70
28	3574 1-Tri-Di. Bell @ 895.00 2-citations @ 25.00 (from Dubs)	J 4219-8	1485.00		4343.70
X Dec 1.	3600 1-Keeney Sup Single @ 120.00	J 4222-22	1200.00	-	4463.70
5	3640 3-citations @ 25.00 from Omaha	J 4225-9	885.00		5348.70
9	3672 1-Tri-Di. Bell @ 895.00 from Omaha	J 4228-26	895.00		6243.70
11	3684 2-Clover Bells @ 895.00	J 4229-26	1790.00		8033.70
13	3703 1-Double Up @ 275.00	J 4231-6	275.00		8308.70
13	3715 1-Champion @ 425.00 from Omaha	J 4231-20	425.00		8733.70
14	3716 1-Ev. Racer @ 530.00	J 4232-11	550.00		9283.70
15	3740 1-Bangtail @ 425.00	J 4233-27	425.00		9708.70
15	3745 2-Ev. Racers @ 550.00 from Dubs	J 4233-32	1100.00		10808.70
20	Progress Contract	J 4236-11		13403.70	2595.00
21	3787 1-Del Di. Bell @ 245.00	J 4237-29	245.00		2350.00
22	10341 - C. for return of old parts.	J 4238-27	1000		2340.00
26	3815 1-Ev Racer @ 550.00	J 4240-13	550.00		1790.00
27	3836 5-Clover Bells @ 895.00	J 4241-16	4475.00		2685.00

case", found on page 26 of the Supplementary Record.
[fol. 70] 9. Order impounding records in the second "Christianson case"; found on pages 27 and 28 of the Supplementary Record.

10. Writ of Assistance in the second "Christianson case", found on pages 28 and 29 of the Supplementary Record.

11. Receipt and Inventory of Records in the second "Christianson case", found on pages 29 to 33 of the Supplementary Record.

12. Proceedings preliminary to order of Continuance in the second "Christianson case", found on pages 33 to 35 of the Supplementary Record.

13. Order of Continuance in the second "Christianson case", found on page 35 of the Supplementary Record.

14. Narrative of portion of testimony of James Christiansen in the second "Christianson case", found on pages 36 and 37 of the Supplementary Record.

15. Narrative of portion of testimony of James L. Brastrup in the second "Christianson case", found on pages 37 and 38 of the Supplementary Record.

16. Narrative of portion of testimony of Howard L. Hartje in the second "Christianson case", found on page 38 of the Supplementary Record.

17. Narrative of portion of testimony of Don Slobinsky in the second "Christianson case", found on page 38 of the Supplementary Record.

18. Proceedings had on April 15, 1954 in the second "Christianson case", found on pages 39 to 44 of the Supplementary Record.

19. List of witnesses in the first "Christianson case", found on pages 46 and 47 of the Supplementary Record.

[fol. 71] 20. Description of Various Documents produced by the United States Marshal in the second "Christianson case", found on pages 58 to 60 of the Supplementary Record.

21. Photostats of: Stanley Baeder ledger sheet, Stanley Baeder Invoice No. 4057, Robert Sande ledger sheet, Robert Sande documents numbered 3956 and

3968 found immediately following page 60 of the Supplementary Record.

B. To strike the following from the brief of appellee which

1. In the so-called chronology immediately preceding page one of appellee's brief everything except the items for the following dates: March 1, 1954, March 22, 1954, April 1, 1954, April 23, 1954 and April 27, 1954.

2. All references in appellee's brief (pages 1 to 24) to the portions of the supplementary record which are enumerated in Part A of this Motion to Strike.

3. All material and quotations in appellee's brief (pages 1 to 24) obtained from the portions of the supplementary record which are enumerated in Part A of this Motion to Strike.

4. The memorandum opinion of the trial Court denying the motion of the appellant for suspension of the execution of the sentence found in the Appendix to appellee's brief, pages 25 to 28.

5. The Johnson Act found in the Appendix to appellee's brief on pages 25 to 28.

6. The conspiracy statute found in the Appendix to appellee's brief on page 31.

[fol. 72] 7. The excerpt from the testimony in the second "Christianson case" found in the Appendix to appellee's brief on page 35.

8. All references in appellee's brief (pages 1 to 24) to the portions of the Appendix to appellee's brief which are heretofore enumerated in Part B of this Motion to Strike.

9. All material and quotations in appellee's brief (pages 1 to 24) obtained from the portions of the Appendix to appellee's brief which are heretofore enumerated in Part B of this Motion to Strike.

The foregoing motion is made upon the record of the proceedings in the trial Court on the order to show cause, as shown by the printed record on file in this Court and the list of docket entries of the Clerk of the trial Court contained in the Appendix to this reply brief. Said motion is made pursuant to Rule 10 of the Rules of this Court, Rule

39(b) of the Federal Rules of Criminal Procedure, Rule 75 of the Federal Rules of Civil Procedure and such other rules and provisions of law as may be applicable.

Hoffman, Donahue & Graff, By John W. Graff, Attorneys for Appellant, 1220 Minnesota Building, St. Paul 1, Minnesota.

[File endorsement omitted.]

[fol. 73] IN UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

No. 15,224

ALLEN I. NILVA, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the
District of North Dakota

John W. Graff (Hoffman, Donahue and Graff were with him on the brief), for Appellant.

Oliver Dibble, Special Assistant to the Attorney General (Warren Olney III, Assistant Attorney General, and William R. Mills, Assistant United States Attorney, were with him on the brief), for Appellee.

Before Sanborn, Collet, and Van Oosterhout, Circuit
Judges

OPINION—November 10, 1955

[fol. 74] COLLET, Circuit Judge:

Allen I. Nilva was convicted of criminal contempt and appeals.

In October, 1952, Elmo T. Christianson, Herman Paster and Nilva were indicted by a Federal Grand Jury for conspiracy to violate the Johnson Act, 15 U.S.C.A. 1172,

prohibiting the interstate transportation of gambling devices. That case will be referred to as the Christianson case. It was charged that the defendants and other co-conspirators conspired to transport gambling devices into North Dakota where they were to be operated under the protection of Christianson, who was elected Attorney General of North Dakota in November, 1950, and assumed that office on January 2, 1951. The three defendants were tried in March, 1953. Nilva was acquitted. The jury failed to agree on the guilt or innocence of Christianson and Paster. The date for the retrial of the latter was first set for March 22, 1954, and later reset for March 29, 1954. It was the Government's theory, which it sought to establish at the first trial and was preparing to prove at the second, that one of the important incidents of the conspiracy was an executed plan to stock-pile a large number of gambling devices of the slot machine variety at St. Paul, Minnesota, in November and December of 1950 and the early part of 1951, to be moved into North Dakota where they were to be operated after Christianson became Attorney General. The Mayflower Distributing Company was a Minnesota corporation wholly owned and controlled by the Defendant Paster. Its principal place of business was at St. Paul. Through its slot machines were bought and sold. Paster and others not involved in the North Dakota case had been indicted, tried and convicted in the United States District Court of Minnesota for violation of the Johnson Act involving the transportation of slot machines into the State of Minnesota. Some of [fol. 75] the records of the Mayflower Company had been used as evidence in that case. In the latter part of February, 1954, when preparations for the second trial of Christianson and Paster were being made, the Minnesota case was pending on appeal. See *Nilva, et al., v. United States*, 212 F.2d 115. That part of the records of the Mayflower Company which was used in the Minnesota case was on file in the Court of Appeals.

In preparing for the second trial of the Christianson case, in the latter part of February, 1954, the Government obtained a subpoena duces tecum directed to the Mayflower Company for the production, among other things, of its records pertaining to the stock-piling of slot machines dur-

ing the latter part of 1950 and the early part of 1951, and the sale and distribution of those machines. Another such subpoena was issued March 22, 1954. The return date of the subpoenas was March 29, 1954, the day the second trial of the *Christianson* case was set at Bismarck, North Dakota. March 29, 1954, the Mayflower records were not produced. Instead, Paster filed a motion to quash the subpoenas. The motion was denied and forthwith subpoenas were issued. Whereupon, Paster's counsel stated that the records called for in the subpoenas would be produced. The trial commenced the next day, March 30th, 1954. On the second day of the trial inquiry was made by Government counsel concerning the production of the records and assurance was given by Paster's counsel that they would be produced the next day—April 1, 1954. On April 1, 1954, Nilva appeared in response to the subpoenas. He was vice-president of the Mayflower Company, regularly employed by that company as its attorney and in a business capacity. He was Paster's brother-in-law and, as noted heretofore, a former defendant in the case. Nilva produced some of the records of the Mayflower Company at that time. While the records he produced showed the purchase of some new [fol. 76] slot machines, there were no records produced of the purchase and stock piling of used machines. Nilva was sworn as a witness and examined concerning the existence of other records showing purchases of slot machines. He swore that he had made a diligent search of the Mayflower records and that the records he produced were all of the records of purchases except the records which were on file in the United States Court of Appeals in the Minnesota case. The following is an illustrative portion of his testimony:

"Q. Well, did the Mayflower Distributing Company purchase used slot machines during the month of January, 1951?

"A. Well, now, now, I can't state whether they did or not. That is a matter that is now involved in the Appellate Court of the Eighth Circuit. You don't want me to answer that. That's a matter that is on appeal now and I don't think it's proper for me to answer that.

"Q. Well, do the records of the Mayflower Distributing

Company, Inc., show the purchase of second-hand slot machines during the month of January, 1951?

"A. Now, Mr. Dibble, the records with reference to that matter have all been subpoenaed and are in evidence in the Appellate Court.

"Q. Can you answer the question?

"A. Well, I just answered it to the best of my ability. Any records with reference to those purchases—they are substantial, sufficiently substantial, I can assure you and they are in the Appellate Court."

Being convinced that the foregoing, and other testimony to the same effect, was not true and that there were additional records called for by the subpoena; not on file in the Court of Appeals, and which showed purchases of used slot machines during the period under inquiry, Government counsel requested an order impounding the records, that Federal Bureau of Investigation agents assigned [fol. 77] to the case be permitted to examine the records and that those which might be found and which had been called for by the subpoenas be brought into court. The order was granted. The next day, four F.B.I. agents commenced the examination of the records at St. Paul. Many records were found which had been called for by the subpoenas and which were not on file in the Court of Appeals in the Minnesota case. Among them were records showing the purchase, by the Mayflower Company, of 198 slot machines, 16 in November, 1950, 94 in December, 1950, 81 in January, 1951, and 7 in February, 1951, whereas the records produced by Nilva showed the purchase of only 78 slot machines between September 20, 1950, and December 29, 1950. As to sales, the records produced by Nilva showed the sale of 64 slot machines between November 16, 1950, and December 28, 1950, and none after January 2, 1951; the effective date of the Johnson Act, whereas the records impounded disclosed the sale of 17 slot machines in November, 1950, 278 in December, 1950, 526 during January, 1951, and one in February, 1951. More than 40 of those shown by the impounded records to have been sold subsequent to January 2, 1951, and not shown in the records produced by Nilva, were sold in North Dakota.

The trial of the *Christianson* case proceeded, it being

necessary, however, for the court to recess for a day to enable the agents of the F.B.I. to complete their examination of the impounded records. As the evidence developed, it appeared to the trial judge that Nilva had testified falsely and had failed to obey the subpoenas. On April 15, Nilva and the other attorneys in the *Christianson* case were called into the court's chambers and Nilva was instructed not to leave the jurisdiction of the court of North Dakota without permission. Since the *Christianson* case had not been concluded, the court impressed upon all present the necessity [fol. 78] that the public and particularly the jury know nothing about any impending contempt proceeding against Nilva in order that the jury not be influenced thereby. At that time, on April 15, 1954, the court was informed in Nilva's presence that Nilva had consulted an attorney in St. Paul about the impending contempt proceedings.

In the course of the trial of the *Christianson* case, Agent Peterson of the F.B.I. prepared and testified from a memorandum he made from the impounded records which showed the slot machines purchased by the Mayflower Company during the period inquired of Nilva about on April 1, 1954. The testimony of Agent Peterson indicated the falsity of Nilva's testimony. Bearing upon the willfulness of Nilva's testimony and his knowledge of Mayflower's records, a former employee of Mayflower's, named James Christensen, testified in the *Christianson* case that shortly before the first trial of that case, when Nilva was a defendant, at Nilva's direction he, Christensen, a bookkeeper, deleted and falsified Mayflower's records in order to prevent those records showing two sales and deliveries of slot machines to North Dakota after January 2, 1951.

The jury returned a verdict of guilty in the *Christianson* case April 22, 1954. Thereafter, on April 23, 1954, the trial court issued an order under Rule 42 (b) of the Federal Rules of Criminal Procedure¹ directing that Nilva appear

¹ "(b)" Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the

[fol. 79] on April 27, 1954, to show cause why he should not be held in criminal contempt for obstructing the administration of justice by (1) giving false and evasive testimony, (2) disobeying subpoena duces tecum No. 78 (issued February 26, 1954) by failing to produce certain therein described records, and (3) disobeying subpoena duces tecum No. 160 (issued March 22, 1954) by not producing certain described records called for by that subpoena.

Nilva appeared with counsel April 27, 1954, and requested a bill of particulars stating what portion of his testimony, of April 1, 1954, was false and evasive. The request was denied. Request was then made for more time to prepare for trial. An adjournment was taken until 3:00 p. m. that day, at which time the contempt hearing proceeded before the court. Nilva was found guilty on each of the three charges and judgment was entered sentencing him to imprisonment for one year and one day. From that judgment he appeals.

The first assignment of error is that there was no competent evidence to support the finding that false and evasive testimony was given. The competency of the evidence received and considered is the crux of the assignment, for if the facts heretofore stated were shown by competent evidence, the falsity of Nilva's testimony that there were no more records of purchases by Mayflower during the period in question except those on file in the Court of Appeals is obvious. It was the evidence adduced at the *Christianson*

essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charge involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment." Fed. Rules Cr. Proc. rule 42 (b), 18 U.S.C.A.

trial, and particularly that of Agent Peterson, which showed that Nilva's testimony was false. A transcript of Peterson's testimony was received in evidence at the contempt hearing. It was objected to on the ground that it was hearsay because Nilva did not have an opportunity to cross-examine Peterson. But Nilva was an attorney of record for the defendant Paster in the *Christianson* case. He says [fol. 80] that he did not participate in the trial and did not sit at the counsel table. But no reason appears why he could not have done so if he had desired. The question is not raised as to whether the extent of his right to cross-examine Peterson as Paster's attorney would have been materially different than it would have been had Nilva been cross-examining the witness in his own contempt proceeding. Since Peterson was testifying in the *Christianson* case to what the voluminous records showed and that was the reason for considering his testimony in the contempt proceeding, there appears to be no material difference. Whether that be true or no, the fact remains that Peterson could have been called by Nilva for examination and the records were there at the trial, in the custody of the court, available to Nilva at his hearing for the purpose of showing any inaccuracies in Peterson's summarization of them. For that reason no possible prejudice could have resulted from the use of the summarization instead of offering the truck-load of exhibits.

The challenge to the competency of the evidence adduced at the *Christianson* trial in the later contempt proceeding poses another question. May a trial court take cognizance of what transpires in the trial of the case in connection with which the contempt was committed when the criminal contempt hearing is later held, or must all of the incidents occurring in the previous trial, which show the contempt, be again proved in the contempt hearing? If the acts and conduct which establish the *prima facie* ground for the contempt charge are established in a proceeding to which the person charged with contempt is a party or of counsel, with adequate opportunity to know the facts and protect himself, there appears to be no sound reason why both he and the court should not be permitted to take cognizance of such evidence in the contempt proceeding without formally re-

introducing that evidence. One of the cardinal distinctions [fol. 81] between summary contempt proceedings and criminal contempt is that in the former all that is material takes place in the court's presence and no independent inquiry is necessary, whereas in criminal contempt the charge is of such a nature that that which may first appear to be contemptuous may be subject to satisfactory explanation to the extent of exculpation or mitigation. *Bowles v. United States*, 44 F. 2d 115; *In Matter of Savin*, 131 U. S. 267. Complete fairness must be scrupulously observed to the end that one charged with criminal contempt may have full opportunity of explanation and defense, but there is no sound reason under circumstances existing in this case for requiring the reintroduction of evidence which the court has heard and the person charged has either heard or has voluntarily turned his back to keep from hearing.²

The foregoing generalizations should not result in distorting the present issue. The figures given by Peterson were mere summarizations and tabulations made from voluminous records under a well recognized rule of evidence excepting such hearsay testimony from the general rule excluding hearsay. Since the original records were available in the contempt proceeding, there is no reason why, under the circumstances here presented, Peterson's testimony was not equally admissible as a summarization of voluminous records in both the *Christianson* case and the contempt proceedings.

The giving of false and evasive testimony does not in itself constitute contempt. The further element of obstruction to the court in the performance of its duty must exist. [fol. 82] *Ex Parte Hudgnigs*, 249 U. S. 378; *In re Michael*, 326 U. S. 224; *Howard v. United States*, 182 F. 2d 908; *Blim v. United States*, 68 F. 2d 484. But it is not necessary that the giving of false or evasive testimony must completely disable the court from functioning before the obstruction

² In a Supplemental Record filed by the Government in this court, a number of references are made to portions of the record in the *Christianson* case. Nilya by motion seeks to have those references stricken. For the foregoing reasons that motion is denied.

may be dealt with as a contempt. *Howard v. United States*, 182 F. 2d 908; *United States v. McGovern*, 60 F. 2d 880. Figuratively speaking, it is not necessary to turn a polecat loose in the courtroom to obstruct the court in the performance of its duty. Nilva says that no obstruction of justice resulted from his conduct. We do not agree. By his testimony he sought to convince the court that the records he produced and those which were in the Court of Appeals were the only records in existence relating to the subject matter he was examined about. He thereby sought to suppress as evidence other germane records, some of which were crucial to the Government's case. The fact that the ~~obstruction~~ which he interposed was overcome by the impounding of the records, their tedious and laborious examination and their transportation to the place of trial, does not make his conduct any less an obstruction. And his conduct did necessitate a delay in the *Christianson* trial.

It is asserted that there is no competent evidence to support a finding of failure, without adequate excuse, to obey the subpoenas. His failure to produce records called for by the subpoenas was demonstrated by their subsequent production under the impounding order. There was ample justification for a finding of willfulness.

It is asserted that the subpoenas were invalid in part because they were unreasonably broad, vague and indefinite, and constituted a fishing expedition. They are not subject to those charges. And another answer to this charge is that [fol. 83] practically all of the records called for by the subpoenas were later found when the records were impounded and examined.

The contention that the finding of the court that Nilva's failure to comply with the subpoenas obstructed justice was not justified is untenable for the reason that his false and evasive testimony was an obstruction.

In criminal contempt proceedings the defendant is presumed to be innocent, he must be proven guilty beyond a reasonable doubt, he cannot be compelled to testify against himself, he shall, if proceeded against under Rule 42(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., be given notice of the charge and the essential facts constituting the contempt charged, described as such, he shall be

advised of the time and place of the hearing, allowed a reasonable time for the preparation of his defense, or procure counsel, to present evidence, and to be heard in person or by counsel. Some of these rights Nilva says were denied him. He says he was not given a fair trial. We find no justification for the charge. He claims the specification of the charge was not sufficiently definite. That claim is without merit. He contends that he was denied sufficient time to prepare his defense, was denied the presumption of innocence and denied the right to have his guilt established beyond a reasonable doubt or be acquitted. We find no justification for these contentions.

The punishment imposed is described as grossly excessive. We are asked to modify and reduce it. The defendant had been an attorney for a number of years. As such he was fully cognizant of the result of his conduct and the effect it might and did have on the conduct of the administration of justice. As an attorney it was his duty to [fol. 84] mote, not to obstruct and hinder, the administration of justice. Those considerations the trial court had in mind when the punishment was fixed: Absent an abuse of discretion, the punishment fixed by the trial court will not be disturbed. *Conley v. United States*, 59 F. 2d 929. We find no justification for finding such abuse.

The judgment is affirmed.

[fols. 85-86] IN UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

No. 15224

ALLEN I. NILVA, Appellant,

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the
District of North Dakota.

JUDGMENT—November 10, 1955

This cause came on to be heard on the record from the
United States District Court for the District of North
Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and
adjudged by this Court, that the judgment and sentence of
the said District Court, in this cause, be, and the same is
hereby, affirmed.

And it is further Ordered by this Court that the defendant
in the District Court, Allen I. Nilya, do surrender him-
self to the custody of the United States Marshal for the
District of North Dakota, if not now in custody, in execution
of the judgment and sentence imposed upon him, within
thirty days from and after the date of the filing of the
mandate of this Court in the said District Court.

November 10, 1955.

[fols. 87-88] IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER ENLARGING TIME FOR FILING PETITION OF APPELLANT
FOR REHEARING—November 30, 1955

On application made It is Ordered by this Court that the
time for filing petition of appellant for a rehearing in this
cause is hereby enlarged or extended for a period of five
days from and after this date.

IN THE

United States Court of Appeals FOR THE EIGHTH CIRCUIT

No. 15,224

Criminal

ALLEN I. NILVA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

A. PREFATORY STATEMENT

On November 10, 1955, an opinion of this Court was filed with the Clerk affirming the judgment of the District Court which found appellant guilty of criminal contempt. This petition for rehearing is made pursuant to Rule 15 of this Court for the sole purpose of directing the attention of the Court to certain controlling matters of law and fact which appellant claims were inadvertently overlooked in the decision of this cause. In compliance with the aforesaid rule,

this petition is accompanied by a certificate of counsel that it is submitted in good faith and is believed to be meritorious.

B. AFFIRMANCE OF THE JUDGMENT BELOW ON THE BASIS OF THE PRIOR TESTIMONY OF LIVING WITNESSES, NOT SHOWN TO BE BEYOND THE JURISDICTION OF THE COURT, IS WHOLLY UNPRECEDENTED IN FEDERAL APPELLATE CASES.

In affirming the conviction herein, this Court has held, in effect, that the findings of the Trial Court with respect to the veracity of appellant's testimony (and, perhaps, his disobedience of the subpoenas) is sustained by "the evidence adduced at the *Christianson* trial, and particularly that of Agent Peterson" (Opinion, p. 7). It is held, further, that the Trial Court did not err in receiving as evidence a transcript of the testimony of Peterson (Opinion, p. 9). As evidence bearing upon the willfulness of Nilva's testimony and his knowledge of the desired records, this Court refers to the testimony of one James Christensen, heard only in the principal case and not offered as evidence herein (Opinion, p. 6). It has denied appellant's motion to strike that testimony and other portions of the record in the *Christianson* case from the supplemental record filed by the Government in connection with this appeal (Opinion, p. 9).

The testimony of Peterson was heard on April 12, 1954, eleven days before issuance of the Order to Show Cause and three days before Nilva was instructed not to leave the jurisdiction of the Trial Court.

The principal basis for the foregoing rulings appears to be the fact that appellant was one of the attorneys of record for defendant Paster in the *Christianson* case and that "no reason appears" why he could not have participated in the trial (Opinion, pp. 7-8). Finally, it is said that "the fact remains that Peterson could have been called by Nilva for examination and the records were there, at the trial, in the custody of the Court, available to Nilva at his hearing for the purpose of showing any inaccuracies in Peterson's summarization of them" (Opinion, p. 8).

It is respectfully but earnestly submitted that the foregoing rulings mark a radical departure from established concepts of constitutional law and controlling principles of federal criminal procedure, both common-law and statutory.

The *Christianson* proceedings and the *Nilva* proceedings are separate and independent. Neither may be identified with the other. Each is separate, each distinct, from the other. In *Parker v. United States*, 1 Cir., 153 F. 2d 66, 70, the Court said:

"On the other hand, a proceeding in criminal contempt is a separate and independent proceeding at law, with the public on one side and the respondent on the other." (Emphasis supplied).

In *Russell v. United States*, 8 Cir., 86 F. 2d 389, 392, this Court said, after noting that no one may be adjudged guilty of a criminal contempt for interfering with the execution of an order which the Court had no jurisdiction to enter:

"But, since a prosecution for a criminal contempt is between the public and the defendant therein, such prosecution is not a part of the cause out of which the contempt arose." (Citing cases; emphasis supplied.)

In both of the above cases, the contempt proceedings were held to be wholly separate, that no attack would be permitted in the contempt proceedings, based on the Court's lack of jurisdiction in the earlier proceedings, since jurisdiction cannot be the subject of a collateral attack. Jurisdiction could be attacked only in the original actions. The contempt proceedings were considered wholly separate and independent.

The contempt prosecution below was commenced on April 23, 1954 by issuance of the Order to Show Cause. The Sixth Amendment requires that in all criminal prosecutions the accused shall enjoy the right "to be confronted with the witnesses against him." It is manifest that testimony heard before commencement of a prosecution is not heard "in" that prosecution. Since time immemorial the common-law rule, particularly applicable where life or liberty is at stake, has forbidden the use of hearsay evidence to establish any specific fact which is susceptible of proof by witnesses who speak from their own knowledge. *Hopt v. Utah*, 110 U. S. 574, 581. Professor Wigmore, on the basis of an exhaustive study of the origins and scope of the hearsay rule, states categorically that:

"No one has ever doubted that the *former testimony* of a witness cannot be used if the witness is *still available* for the purpose of testifying at the present trial."

Wigmore on Evidence, 3d Ed., Vol. V, Sec. 1415.

It is not suggested, of course, that the Trial Court in a contempt proceeding must refuse to take cognizance of all that transpired in the trial of the case in which the contempt arose (See Opinion, p. 8). Indeed, the record of the prior proceeding is perhaps the only proper source from

which the Court may ascertain the nature of the proceedings therein. Subject to formal requirements as to incorporation into the record in the contempt proceeding; the prior record may well be the best evidence of the statements which are alleged to have been contemptuous or of the orders which are alleged to have been disobeyed, of the relevance and materiality of such testimony or of the evidence sought by such order and, perhaps, of the effect which the allegedly contemptuous acts had upon the course of the earlier trial.

But even if the transcript of testimony at the prior proceeding is direct evidence of what was said therein, it is only secondary evidence as to the *truth* of what was said. The truth of the testimony at the *Christiansen* trial was the primary issue in the *Vitva* case. Each of those proceedings was separate, each independent of the other. The competency and sufficiency of the evidence in one cause cannot be measured by tests which control the other. The truth of the assertions of the witness Peterson and others could be proved only by calling those witnesses in the *Vitva* prosecution.

It is true, of course, that a deposition or transcript of former testimony will sometimes be admitted in a subsequent hearing upon a proper showing that the issues were the same in each case and that the parties against whom such evidence is to be used are the same in "motive and interest." See *Wigmore*, op. cit., Sections 1386, 1388. The admission of such evidence, however, is invariably conditioned upon the making of affirmative proof that the witness at the time of the later hearing is deceased, incapacitated or beyond the reach of court process or that his presence is unknown and that his absence has been procured by the party against whom the evidence is to be used. See 31 CJS, *Evidence*,

Secs. 384-96; *Motes v. United States*, 178 U. S. 485, 474. As stated by *Corpus Juris Secundum*, op. cit., at page 1187:

"The mere fact that testimony has been given in the course of a former proceeding between the parties to a case on trial is no ground for admitting it in evidence."

In the instant case the Government failed to present a scintilla of evidence to show that its own employee, Peterson, could not be produced at the contempt hearing. For that reason alone—if not for the further failure to demonstrate an identity of interest and issues in the separate causes—that testimony should have been excluded for lack of a proper foundation. But the Government went further. It then had the effrontery to urge that this Court should not only abandon the established rule, but that it should give recognition to a circumstance which is the very antithesis of that rule. Thus, the "fact" (which was never proved) of Peterson's availability at the contempt hearing, instead of making his prior testimony inadmissible, is actually treated as a justification for its admissibility!

No precedent precisely in point has been found for sustaining findings of contempt with respect to facts occurring outside the presence of the Court on the basis of testimony presented in the principal case before issuance of an order to show cause—at least in the absence of a showing that such testimony could not be reproduced in the subsequent hearing. But even if the testimony of witnesses such as Peterson had been taken, after issuance of the Order to show cause, by a deposition directed only to the contempt prosecution and in compliance with all of the formalities as to notice to Nilva, such a deposition could not be used herein in the absence of a showing that the witness was dead.

or otherwise beyond the jurisdiction of the Trial Court. See Rule 15, *Federal Rules of Criminal Procedure*. So too, even if the separate *Christiansen* prosecution were deemed to be analogous to a preliminary hearing on the contempt charge, introduction of a transcript of the prior testimony would be held by the Supreme Court to constitute reversible error. See *Motes v. United States*, 178 U. S. 458. And because the personal knowledge and impression of the trial judge of what happened in the *Christiansen* trial "could not be tested by adequate cross-examination" in the contempt proceedings, reference to the prior prosecution is directly contrary to the spirit of *In re Murchison*, ——U. S. ——, 75 S. Ct. 623, 626.

We deem it no answer to say—as could be said in the second trial of any case—that Peterson might have testified again as he did in the earlier proceedings. His testimony would hardly be expected to be identical since it is presumed that his testimony would be directed towards sustaining the charges of contempt and his cross-examination would be expected to be concerning the contempt charges. It appears insufficient to urge that Nilva, as an attorney of record for the defendant Paster, might have cross-examined both Peterson and Christensen had he desired to do so (Opinion, p. 7). Nilva was absent when those witnesses were called and he was wholly without reason or information that their testimony might be used against him in contempt proceedings which proceedings had not yet been commenced. It must not be assumed that Nilva would have omitted cross-examination of Peterson even if he could have known of the charge that would be later made against him. Whatever views Nilva may have had regarding the cross-examination

of Peterson had he been present, Nilva would have had every incentive to have had the cross-examination pressed further by himself or by his own counsel if he could have surmised that Peterson's testimony was to affect him.

This Court says that in proceedings of this kind, "complete fairness must be scrupulously observed" (Opinion, p. 9). Does not "scrupulous observance of complete fairness" require that Nilva's omission of his right to cross-examine Peterson, be weighed in the light of the fact that when Peterson testified, Nilva could not possibly have known of the criminal contempt with which he was later charged? Ought not Nilva to have the right of cross-examination, in the light of the knowledge that the liberty of *Nilva himself* is periled by the testimony of Peterson?

The Courts strongly disapprove of the practice of "double cross-examination." Mr. Murphy was the principal attorney of record for Paster. If Nilva as an attorney of record for Paster insisted on further cross-examination of Peterson by himself and/or his own counsel, would such cross-examination have been permitted? And if it now be said that such cross-examination would have been permitted would that be consistent with the Trial Court's intention, subsequently expressed, that the jury know nothing about any impending contempt proceeding (Opinion, pp. 5-6)? Is it fair to say, as the Court does, that no reason appears why Nilva could not have cross-examined if he desired to do so?

Simple fairness—not merely "scrupulous observance of complete fairness"—requires that Nilva be given the right to cross-examine Peterson in the light of the knowledge which he now possesses and did not possess before—the knowledge that Peterson's testimony is directed against

Nilva. And the foregoing point is made weightier by the fact that Nilva's participation as attorney in the trial of Christianson and Paster was in fact purely formal and that Nilva did not even sit at the counsel table.

So far as appellant has been able to determine, the Federal Courts are unanimous in holding that, absent proof of an identity of issues and interest and the unavailability of a witness, no man shall be held criminally accountable by reason of testimony not produced in the proceedings which result in his conviction. It is respectfully submitted that adoption of the rule announced herein is wholly unprecedented and so contrary to the principles controlling analogous cases that it should not be permitted to stand.

C. THE ESSENTIAL FINDINGS OF THE TRIAL COURT CANNOT BE SUPPORTED BY SUMMARIES OF WRITINGS WHICH WERE NOT OFFERED BY THE GOVERNMENT.

Even if the testimony of Agent Peterson had been heard in the contempt proceeding after issuance of the Order to show cause, it could not support the findings of the Trial Court. As this Court has correctly noted, a well-recognized exception to the hearsay rule permits the introduction in a proper case of summarizations and tabulations made from voluminous records (Opinion, p. 9). Assuming that a proper foundation had been laid, that principle would authorize the use of Peterson's testimony in the Christianson case as evidence of the stockpiling of slot machines in the State of Minnesota. But the issues in that case were entirely different from the issues herein. The contents of the records in St. Paul were of concern to the Court below for

the sole purpose of establishing whether the writings described in the subpoenas were in fact in the custody of the Mayflower Distributing Company, and whether Nilva had falsely testified with respect to the existence of those records and his search therefor. No principle of the law of evidence can be more firmly established than that which provides that the *existence* of a writing can be shown only by the production of the writing itself, unless it can be shown that the writing has been destroyed or is otherwise unavailable.

See *Wigmore On Evidence*, 3d Ed., Volume 4, Sec. 1192. The rule which permits the use of secondary evidence to establish the contents of written documents has never been applied to defeat the preferred evidence rule where the existence of the writing is in issue. See *Wigmore*, Op. Cit., Sec. 1244(4).

In *Cooper v. U. S.*, 8 Cir., 9 F. 2nd 216, 223, this Court quoted with approval the following statement from *Ruling Case Law*, Volume 2, page 360:

"Where complicated books of account are in evidence and elaborate computations are necessary to determine the results and amounts evidenced by the books, an expert may be called upon to make such computations and to state them to the jury, but his conclusions may not invoke the determination by him of controverted questions either of fact or of law; and the assumptions of fact, if any, on which his computations are based must be clearly stated in his evidence so that the jury can reject or modify his results if they do not find proven the facts on which his results are based. And it is never proper for an expert simply to testify that the books show certain facts. The books themselves must be introduced as primary evidence and the testimony of the expert is secondary and explanatory only." (Emphasis supplied.)

It is suggested by the Opinion herein that the use of Peterson's summarizations and tabulations is justified by the fact that the original records were available in Court at the time of the contempt hearing. It is respectfully submitted that only a showing that such records did not in fact exist, or that they were otherwise unavailable at the trial, would justify reference to testimony by Peterson or others as evidence of the falsity of Nilva's testimony and his failure to obey the subpoenas.

D. THE FALSITY OF APPELLANT'S TESTIMONY IS NOT SHOWN BY EVIDENCE CONTAINED IN THE RECORD HEREIN OR IN THE RECORD IN THE CHRISTIANSON CASE.

In the reply brief heretofore filed by the appellant (pages 12-13), the Court's attention was directed to substantial misstatements of the testimony of appellant. It appears, nevertheless, that the Court was misled by the Government's statements and concluded that Nilva had sworn that he had made a diligent search of the Mayflower records and that "the records he produced were all of the records of purchases except the records which were on file in the United States Court of Appeals in the Minnesota case" (Opinion, p. 4).

Nilva did not so testify. He described the magnitude of the task he had undertaken in attempting to comply with subpoenas of such breadth through a search of "thousands" of records (P. 17-19). He readily admitted that he may not have examined daily ledgers and he declined to state that he had examined monthly journals (R. 17). Nilva acknowl-

edged without hesitation that purchases of new equipment would be shown in running accounts rendered by the manufacturer from whom purchases had been made, and that records of such accounts could easily be found among Mayflower's records (R. 20). It was never suggested that such ledgers, journals and accounts had been produced. From the very beginning of his testimony, Nilva made it clear that he had not personally conducted the entire search to which he testified, having been assisted therein by office employees (R. 9, 15, 17). He expressly denied having any knowledge of bookkeeping methods or of the contents of specific records (R. 9, 10, 17, 19). Again and again he refused to respond categorically as to the contents of the corporate records, and he repeatedly qualified his answers as to the search which he had made and as to the best of his "knowledge and ability" (R. 14, 15, 16, 18). Nowhere in the entire record did Nilva claim to have produced any specific records other than "compiled" records relating to used machines and all "incoming invoices," for certain months, relating to new machines (R. 8, 18).

The significance of this Court's misunderstanding of the facts is self-evident. This Court has found the evidence sufficient to show the falsity of Nilva's testimony "that there were no more records of purchases by Mayflower during the period in question except those on file in the Court of Appeals" (Opinion, p. 7); it has not determined whether the record supports a finding that Nilva's actual testimony was false. The Court has found, moreover, that justice was obstructed by Nilva's testimony in that "he sought to convince the Court that the records he produced and those which were in the Court of Appeals were the only records in existence

relating to the subject matter he was examined about" (Opinion, p. 10); it has not determined whether justice was obstructed by Nilva's ready admission that all had not been produced.

If Nilva had testified in the manner suggested by the Government and in the Opinion, it is manifest that the first specification of contempt would have been proven by the introduction at the contempt hearing of any one of the multitude of writings which were described in the subpoenas. But his testimony having been much narrower in scope, its falsity and effect is not so readily apparent. The judgment below can be sustained only upon a showing of facts from which it can be inferred, in substance, that Nilva had not undertaken the examination he reported or that he had found records other than those about which he testified and that the administration of justice had been obstructed thereby.

It is apparent that this Court has been seriously imposed upon by the Government and misled in its understanding of the essential facts below. For that reason alone, if not for the insufficiency of the evidence, it is respectfully submitted that the judgment of the Trial Court should be set aside.

E. CONCLUSION

For the foregoing reasons, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed, and that the judgment of the United States District Court for the District of North Dakota be reversed.

Respectfully submitted,

HOFFMANN, DONAHUE & GRAFF

By John W. Graff,

Attorneys for Appellant

1220 Minnesota Building

St. Paul 1, Minnesota

F. CERTIFICATE

I hereby certify, in compliance with Rule 15 of this Court, that this Petition for Rehearing is submitted in good faith and is believed to be meritorious.

JOHN W. GRAFF

[fol. 105] IN UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

No. 15,224

ALLEN I. NILVA, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Before SANBORN and VAN OOSTERHOUT, Circuit Judges.

OPINION ON PETITION FOR REHEARING—December 21, 1955

PER CURIAM.

Judge Collet, who prepared the opinion for the Court, died before the appellant's petition for a rehearing was received from the Clerk.

[fol. 106] The petition fails to demonstrate that any controlling question of fact or law was overlooked by this Court. The appellant insists that the evidentiary basis for his conviction of criminal contempt is inadequate on the ground that incompetent evidence, consisting of excerpts from the record of the trial of Christianson and Paster, was received in the contempt proceeding and was relied upon by the District Court.

It was the conduct of Nilva which occurred in the presence of the District Court and the evidence introduced relative thereto during the trial of Christianson and Paster which resulted in the subsequent contempt proceeding against Nilva. The court could, we think, properly have proceeded summarily against Nilva for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. In *Sacher v. United States*, 343 U.S. 1, 11, the Supreme Court said:

"We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it; if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer

judgment until its completion he may do so without extinguishing his power."

The District Court chose to proceed against Nilva at the completion of the trial under Rule 42(b), giving him a more adequate opportunity to produce evidence in explanation, exculpation or mitigation of his conduct. He cannot complain that he was proceeded against under the more favorable rule.

If the conduct of Nilva, found to have been both contumacious and obstructive, had been committed outside the [fols. 107-108] presence of the court, the introduction of the evidence of which Nilva complains would present a serious question.

The fact that the trial court elected to proceed under Rule 42(b) rather than under Rule 42(a) did not, in our opinion, place Nilva in any stronger position with respect to the admission of evidence to substantiate the charge that his conduct constituted contempt than he would have been in had he been proceeded against under Rule 42(a), although it gave him a better opportunity to defend against the charge.

We think the District Judge was entitled to consider what had occurred in his presence during the trial of Christianson and Paster as shown by the record in so far as it characterized the conduct of Nilva, and therefore did not err in receiving in evidence the excerpts from the record of the trial, of which Nilva complains. We adhere to our opinion that there was an adequate factual and legal basis for the judgment and sentence from which this appeal was taken.

The petition for a rehearing is denied.

[fols. 109-110] IN UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION OF APPELLANT FOR REHEARING
—December 21, 1955

Petition of appellant for a rehearing filed in this cause has been considered, and it is now here Ordered by this

Court that said petition be, and the same is hereby, denied.
Per curiam opinion filed.

December 21, 1955.

[fols. 111-112] IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—January 3, 1956

On consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 3, 1956.

[fols. 113-114] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 115-116] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1955

No. —

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI TO FEBRUARY 18, 1956

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of

certiorari in the above-entitled cause be, and the same is hereby, extended to and including Feb. 18th, 1956.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 16th day of January, 1956.

[fol. 117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 702

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 2, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly-certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(447-3)

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~702~~ 37

ALLEN I. NILVA, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1955.

No.

ALLEN I. NILVA, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 10, 1955.

CITATION TO OPINIONS BELOW

The unreported memorandum opinion of the District Court, rendered after the entry of its judgment in the course of denying a motion for suspension of sentence, is printed as Appendix A hereto. The opinion of the Court of Appeals for the Eighth Circuit,

printed as Appendix B hereto, is reported at 227 F^{2d} 74. The opinion of the Court of Appeals on the denial of the petition for rehearing, printed as Appendix C hereto, is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955. Rehearing was denied on December 21, 1955. On January 16, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a criminal contempt conviction under Rule 42(b) of the Federal Rules of Criminal Procedure can be premised exclusively on prior testimony not introduced at the contempt hearing and not subject to cross-examination by counsel for the accused.
2. Whether Rule 42(a) of the Federal Rules of Criminal Procedure is applicable where the testimony before the court on the contumacious acts relates to events occurring outside the courtroom and whether, in any event, the applicability of Rule 42(a) can be used to narrow the rights accruing to a defendant in a proceeding instituted under Rule 42(b).
3. Whether petitioner's conviction for contempt can be sustained in the absence of any competent evidence establishing guilt beyond a reasonable doubt.
4. Whether other errors were committed in the proceedings below which warrant reversal or reconsideration of the conviction.

STATUTES INVOLVED

Rule 42, Federal Rules of Criminal Procedure, 18 U.S.C.A.:

(a) Summary disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT OF THE CASE

On April 27, 1954, the United States District Court for the District of North Dakota found the petitioner, an attorney, guilty of criminal contempt (R. 67). The

acts constituting such contempt, the court further found, "did obstruct the administration of justice in the trial of the case of United States of America, plaintiff, against Elmo T. Christianson and Herman Paster" (R. 67). Petitioner was thereupon sentenced to imprisonment for a year and a day (R. 67). On appeal, the conviction was affirmed by the Court of Appeals for the Eighth Circuit, 227 F. 2d 74; Appendix B hereto, *infra*, p. 5a.

This contempt proceeding had its origins in the retrial¹ of Christianson and Paster on charges of conspiring to violate the Johnson Act, 15 U.S.C. §1172, prohibiting the interstate shipment of gambling devices.² Prior to this retrial, which began March 29, 1954, the District Court, at the request of the Government, issued two subpoenas duces tecum. They were directed to the Mayflower Distributing Co. of St. Paul, Minn., a corporation wholly owned by the defendant Paster. Subpoena No. 78 was issued on February 26, 1954 (R. 26) and subpoena No. 160 was issued on March 22, 1954 (R. 24). Both required that the corporation produce certain books and records reflecting the purchase and sale of new and used coin-operated devices. They were returnable March 29, 1954, the date set for the retrial. Service was effected in both in-

¹ At the first trial, the jury had been unable to agree as to the guilt of Christianson and Paster and a mistrial was declared. Petitioner Nilva was acquitted at this first trial and hence was not involved in the retrial.

² Christianson and Paster were convicted of the conspiracy charges on the retrial. Their conviction was affirmed on appeal by the Court of Appeals for the Eighth Circuit, 226 F. 2d 646. The matter is now pending before this Court on a petition for a writ of certiorari. No. 663, October Term, 1955.

stances on Walter D. Johnson, Secretary-Treasurer of the Mayflower Distributing Co. (R. 25, 27-28).

The Court of Appeals noted, in reliance on a supplemental record filed before it by the Government over petitioner's objection that it contained matters not introduced at the contempt hearing,³ that the subpoenaed records were not produced on March 29, the return date. Instead, the defendant Paster moved on that day to quash the subpoenas as violative of his privilege against self-incrimination, a motion that was denied (S. R. 21, 25-26). The Government thereupon orally moved, under Rule 17(c) of the Federal Rules of Criminal Procedure, that the books and records be produced forthwith and the court so ordered (S. R. 27).

On April 1, 1954, the third day of the Christianson-Paster trial, petitioner Nilva voluntarily appeared in answer to the subpoenas and the forthwith order (R. 8-9). A hearing was held on that day in the trial judge's chambers (R. 5). Government counsel indicated the belief that petitioner had not produced all the subpoenaed records, that what was produced related only to new machines and not to used machines (R. 6). Petitioner was thereupon put under oath and examined by Government counsel (R. 8-24). He

³ Petitioner filed in the Court of Appeals a motion to strike all portions of the supplemental record and of the Government's brief which related to matters not made part of the record before the District Court in the contempt proceeding. Most of this supplemental record consisted of pleadings, orders, exhibits, excerpts of testimony and other proceedings in the Christianson-Paster conspiracy trial, practically none of which was incorporated by reference or otherwise introduced into the record of petitioner's contempt case. The motion was denied. 227 F. 2d at 79, fn. 2; Appendix B, *infra*, p. 12a, fn. 2.

testified that he was the vice-president of the Mayflower Distributing Co. (R. 8) and that he had "brought all the records that [he] could that those subpoenas asked for" (R. 9). He testified further (R. 9) to the effect that many of the requested records had been subpoenaed for use in another criminal case then pending before the Court of Appeals for the Eighth Circuit.⁴ And he stated that he was but a nominal officer of the corporation and was not the best qualified to testify as to the bookkeeping records (R. 11).

Petitioner further described the magnitude of the task of attempting to comply with subpoenas of such breadth through a search of "thousands" of records (R. 17-19). He readily admitted that he may not have examined daily ledgers and he declined to state that he had examined monthly journals (R. 17). He unhesitatingly acknowledged that purchases of new equipment would be shown in running accounts rendered by the manufacturers from whom such purchases were made, and that records of such accounts could easily be found among Mayflower's records (R. 20). But he never suggested that such accounts and records had been produced. Moreover, petitioner made it clear that he had not personally conducted the entire search but had been assisted by office employees (R. 9, 15, 17). He expressly denied any knowledge of bookkeeping methods or of the contents of specific records (R. 9, 10, 17, 19). Repeatedly he refused to respond categorically to questions as to the contents of corporate records and he qualified his answers as

⁴ *Nilva v. United States*, 212 F. 2d 115 (C.A. 8), cert. den., 348 U. S. 825. The appellant in that case was Samuel George Nilva, not the petitioner in the instant proceeding.

to the search he had made as being thorough "to the best of my ability" (R. 14, 15, 16, 18). Nowhere did he claim to have produced any specific records other than "compiled" records relating to used machines and all "incoming invoices" for certain months relating to new machines (R. 8, 18).

The trial judge later stated (Appendix A hereto, *infra*, p. 2a)⁵ that at its conclusion he had considered petitioner's testimony at this April 1 hearing to be evasive and accordingly he had granted the Government's request for an order impounding all records of the Mayflower Distributing Co. at its place of business in St. Paul, Minn. The records thus impounded, according to the contested supplemental record (S. R. 34), consisted of thousands of documents filling a "post office truckful." And that record indicated that on April 8 the Government asked for and received a delay of one day in the Christianson-Paster trial proceedings in order that these documents might be examined and analyzed. The judge later ordered (S. R. 39-44) that the petitioner not leave the jurisdiction of the court without permission.

In the subsequent words of the trial judge (Appendix A hereto, *infra*, p. 2a): "Action on the

⁵ This statement was made in the judge's memorandum opinion denying the motion for suspension of the sentence, an opinion which was rendered after the entry of the contempt judgment. It has been held that an opinion announced after the verdict is rendered which states merely the course of reasoning which conducted the court to its judgment "may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record." *Williams v. Norris*, 25 U. S. (12 Wheat.) 117, 118.

matter was deferred until after the jury verdict in the case of U. S. v. Christianson, et al., because it was the Court's desire that the jury should not learn of the affair during the trial, so that the defendants therein would not be prejudiced by it in any way. There was no doubt that the jurors were not only aware of Nilva's close connection with one of the defendants but also due to widespread public interest in the trial, were aware of the fact that Nilva had at one time been a co-defendant in the case and had been found not guilty in a previous trial thereof."

On April 23, 1954, the day after Christianson and Paster had been found guilty of the alleged conspiracy, the District Court pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure issued an order to show cause (R. 2-4) why petitioner should not be held in criminal contempt for obstructing the administration of justice by:

- (1) Giving false and evasive testimony under oath on April 1, 1954, upon answering, as vice-president of the Mayflower Distributing Co., subpoenas duces tecum directed to that company in the Christianson-Paster criminal case.
- (2) Disobedience to subpoena duces tecum No. 78, in that five named articles were not produced as required thereby.
- (3) Disobedience to subpoena duces tecum No. 160, in that twenty-two named articles were not produced as required thereby.

The order, which was issued on Friday, April 23, was returnable on Tuesday, April 27, at 10 A.M. (R. 2). At the hearing on the morning of April 27, petitioner's counsel asked for additional time (R. 33) in order to

prepare a proper defense. It was explained that other commitments of counsel had prevented more than a brief contact with petitioner during the preceding four days, which included a week-end. The request for additional time was denied except to the extent that the matter was continued until 3 P.M. that same day. During the morning hearing, a request for a bill of particulars (R. 32, 36) as to the first specification of contempt—the giving of false and evasive testimony—was also refused (R. 36-37).

At the afternoon hearing, the court stated to petitioner's counsel that "This being an order to show cause . . . I believe the burden is on you to proceed" (R. 29). At petitioner's request, his testimony at the April 1 hearing was made part of the record in the contempt proceeding, together with subpoenas No. 78 and No. 160 (R. 38). Petitioner thereupon testified in his own behalf (R. 38-58), introduced fifteen exhibits, and was cross-examined by Government counsel (R. 62-67). Petitioner's testimony revealed that he was an attorney who worked in a legal capacity for the Mayflower Distributing Co. (R. 39) and that he was the brother-in-law of Herman Paster, the sole owner of that corporation (R. 40).

Government counsel presented no witnesses and introduced no evidence at the contempt hearing apart from moving that the transcript of testimony of one Richard N. Peterson at the Christianson-Paster conspiracy trial be made a part of the contempt proceedings (R. 59). According to the Court of Appeals, 227 F. 2d at 77, *infra*, p. 9a, Peterson was an F.B.I. agent "who prepared and testified from a memorandum he made from the impounded records which showed the slot machines purchased by the Mayflower

Company during the period inquired of Nilva about on April 1, 1954."

Petitioner's counsel objected to the introduction of this transcript on the ground of hearsay and lack of opportunity to cross-examine Peterson (R. 60). The objection was overruled and the transcript was admitted (R. 61). In this connection, petitioner testified that he was not present at the time Peterson testified in the conspiracy case (R. 60) and that while he had been an attorney for the defendant Paster at an early motion stage of the conspiracy case he had thereafter withdrawn and had no part in any of the subsequent proceedings (R. 61).

At the close of petitioner's testimony, the District Court found petitioner guilty of criminal contempt and sentenced him to imprisonment (R. 67). It was also ordered, though not as part of the sentence, that petitioner never again be allowed to practice in the District Court in North Dakota (R. 67). The conviction was sustained on appeal to the Court of Appeals for the Eighth Circuit, 227 F. 2d 74; Appendix B hereto, *infra*, p. 5a. That court held that the conviction under Rule 42(b) could be based exclusively on prior testimony given in the conspiracy trial and not introduced in the contempt proceeding since the petitioner was an attorney of record in the conspiracy case and could have cross-examined any witnesses in that case whose testimony was relevant to the contempt, or he could have called such witnesses for cross-examination at the contempt hearing. In its opinion denying the petition for rehearing, Appendix C, *infra*, p. 16a, the court added that petitioner was in no position to complain about the use of such prior testimony since he could have been subjected to the summary procedure of Rule 42(a).

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Matusow v. United States*, F. 2d , decided January 27, 1956, on important and hitherto unresolved issues growing out of criminal contempt proceedings instituted under Rule 42(b) of the Federal Rules of Criminal Procedure. The decision below also directly conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Bowles v. United States*, 44 F. 2d 115, and with pertinent principles established by this Court, with respect to the applicability of Rule 42(a) to a proceeding of this nature, and with respect to the proof necessary to sustain a contempt conviction. Because of these conflicts and because the case involves important problems in the administration of criminal justice in the federal courts, the grant of a writ of certiorari is appropriate in this proceeding.

I. The decision below directly conflicts with the Matusow decision as to whether a criminal contempt conviction under Rule 42(b) can be premised exclusively on prior testimony not introduced at the contempt hearing and not subject to cross-examination by counsel for the accused.

The Court of Appeals in this case held that, in determining whether petitioner was guilty of contempt in a proceeding instituted under Rule 42(b), the trial court could take cognizance of evidence adduced at the previous Christianson-Paster conspiracy trial in connection with which the alleged contempt was committed. It held that all of the incidents occurring in the previous trial which show the contempt need not be again proved in the contempt hearing, at least where the person charged with

contempt was a party or of counsel in the prior trial. 227 F. 2d at 78-79; Appendix B, *infra*, pp. 11a-12a.

Thus, in sustaining the trial court's determination based on prior testimony of witnesses before it, the Court of Appeals referred only to testimony given in the prior conspiracy trial. "It was the evidence adduced at the *Christenson* trial," said the court, "particularly that of Agent Peterson, which showed that Nilva's testimony was false." 227 F. 2d at 78; Appendix B, *infra*, p. 11a. And as evidence of the willfulness of petitioner's testimony and his knowledge of Mayflower's records, the court pointed to the testimony of one James Christenson in the prior conspiracy trial. 227 F. 2d at 77; Appendix B, *infra*, p. 9a.

Not so much as a fleeting oral reference to the Christenson testimony was made at the contempt hearing, although a transcript of the Peterson testimony was introduced. In other words, at no time was petitioner confronted by Peterson, Christenson or any other witness, or given an opportunity to cross-examine them in relation to the subject matter of the contempt trial. Nor was there any showing that any of these witnesses were unavailable at the time of the contempt hearing.

In *Matusow v. United States*, F. 2d , decided January 27, 1956, the Court of Appeals for the Fifth Circuit squarely held that a contempt proceeding under Rule 42(b) requires confrontation by all witnesses against the accused and an opportunity to cross-examine them in the plenary contempt hearing. At the Matusow contempt hearing, as in this case, the Government introduced no proof whatever apart from submitting a transcript of evidence of a prior

motion for a new trial in an independent criminal proceeding wherein Matusow had submitted an allegedly false affidavit. The trial court, in finding Matusow guilty of contempt, relied on testimony given before it in open court by other witnesses in the original criminal trial and on the motion for a new trial. After fully discussing the pertinent authorities in this Court, the Court of Appeals reversed the contempt judgment and stated (slip opinion, p. 24):

Nor was appellant confronted with the witnesses against him or afforded the opportunity of cross-examination. The Court below had concluded that appellant committed perjury not only from having heard him testify twice, but from testimony given in open court by other witnesses both at the trial of Jencks and on the hearing of the motion for new trial. Appellant was, under the authorities above discussed, entitled to have that testimony given in a plenary proceeding at which his attorney had the right of cross-examination.

Thus the *Matusow* holding flatly contradicts the ruling below that contempt can be proved merely by reference to testimony in prior proceedings and that it is unnecessary to prove in the contempt proceedings all the incidents demonstrating the contempt. The confrontation and cross-examination emphasized in the *Matusow* case have meaning only in relation to a requirement—which the court below denied—that all the elements of contempt be proved in the plenary contempt hearing.

The conflict between these two rulings is not made less irreconcilable by reason of the finding below that petitioner was an attorney of record for defendant Paster at an early motion stage of the Christianson-

Paster conspiracy proceeding. The Court of Appeals sought to impart significance to that fact by stating that, while petitioner did not participate in the conspiracy trial and did not sit at the counsel table, there was no reason why he could not have done so had he desired; thus he could have cross-examined Peterson at the conspiracy trial as Paster's attorney and accomplished as much as by cross-examining him at the contempt hearing. Moreover, said the court, petitioner could have called Peterson at the contempt hearing, along with the records, for the purpose of showing any inaccuracies in Peterson's summarization of them. 227 F. 2d at 78; Appendix B, *infra*, p. 11a.

Apart from the undenied fact that petitioner did not actually participate in the conspiracy trial as an attorney for Paster, petitioner did not know and could not know at the time of Peterson's testimony that it would later be used as proof of the contempt. The order to show cause why he should not be held in contempt was not issued until eleven days after Peterson testified. Even if petitioner had known definitely that contempt proceedings would later be brought, any cross-examination of Peterson at that point as to the issues involved in the contempt proceeding would have been ruled out as irrelevant to the conspiracy trial. As the trial judge later stated, Appendix A, *infra*, p. 2a, the court was anxious not to permit the jury to learn of the impending contempt matter so that the conspiracy defendants would not be prejudiced thereby. And certainly it was not petitioner's burden at the contempt trial to call for cross-examination all witnesses who had previously testified in an independent criminal proceeding and

whose testimony might or might not be subsequently utilized by the court in determining guilt on the contempt charge.

If the *Matusow* case be correct, petitioner had a right under Rule 42(b) to be confronted by Peterson and to cross-examine him at the contempt hearing. And, in the words of the *Matusow* ruling, petitioner was entitled to have Peterson's testimony "given in a plenary proceeding at which his attorney had the right of cross-examination" (emphasis added). In other words, despite the fact that petitioner himself was an attorney, he had a right to have counsel of his own choosing for purposes of the contempt proceeding. The right of cross-examination is one that is normally exercised by one's counsel. And exercising that right through counsel is appropriate here only in the independent contempt proceeding. To attempt to exercise it through counsel in a separate and disconnected criminal trial would be both futile and chaotic.

The error and confusion inherent in the ruling below is occasioned in part by a failure to appreciate that a proceeding in criminal contempt is a separate and independent proceeding at law. *Parker v. United States*, 153 F. 2d 66, 70 (C.A. 1). It is not a part of the case out of which the contempt arose. *Russell v. United States*, 86 F. 2d 389, 392 (C.A. 8). Only by maintaining a sharp demarcation between the contempt proceeding and the case from which it sprang, a demarcation that cuts through matters of evidence, can the rights of the individual accused of contempt be properly protected.

The issue thus raised by the decision below is of obvious and substantial importance, meriting the

attention of this Court. Never before has a criminal conviction been affirmed in a federal appellate court by reliance on the prior testimony of witnesses who, though presumably still available, are not called at the trial so that the accused may be confronted by them and subject them to cross-examination through counsel of his own choosing. To permit the judgment below to stand is to twist a Rule 42(b) proceeding into a vehicle for imposing criminal sanctions in violation of the most basic elements of due process and fair play, contrary to the intent of Rule 42(b).

The decision below is contrary to the "undoubted tendency" of this Court, noted by the Court of Appeals in the *Matusow* case (slip opinion, p. 21), "to observe, as far as may be, in the narrowly restricted area conceded to be covered by Rule 42(b), the protection given to defendants in criminal trials under the Bill of Rights." It is contrary to this Court's expression in *In re Oliver*, 333 U. S. 257, 272, that in a contempt proceeding as elsewhere, "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in Court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

2. The decision below directly conflicts with the *Matusow* and *Bowles* decisions as to the applicability of Rule 42(a) to a contempt case of this nature and the decision constitutes an unwarranted intrusion on the rights attendant on a proceeding instituted under Rule 42(b).

Despite the fact that the contempt proceeding against petitioner was premised in the trial court exclusively on Rule 42(b) of the Federal Criminal Rules,

the Court of Appeals held in its opinion denying the petition for rehearing (Appendix C, *infra*, p. 17a) that the trial court "could, we think, properly have proceeded summarily against Nilva for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure."⁶

In effect, the court held that since petitioner might have been subjected to summary procedure under Rule 42(a), he was not in a position to complain about any short-cuts or deficiencies in procedure that might have occurred in the proceeding instituted under Rule 42(b). This ruling given in the opinion on rehearing serves to explain the summary rejection given in the court's original opinion to many of petitioner's claims that the procedural requirements expressed and implied in Rule 42(b) had not been followed and that he had been denied a fair trial. See 227 F. 2d at 79-80; Appendix B, *infra*, pp. 13a-14a.

The court's holding that Rule 42(a) was applicable was premised on the belief that the conduct of Nilva found to have been contumacious and obstructive was committed wholly within the presence of the trial judge. If that were not so, said the court below, "the introduction of the evidence of which Nilva complains would present a serious question." Appendix C, *infra*, p. 17a. In the court's words, "It was the conduct of Nilva which occurred in the presence of the District

⁶ The District Court was also of the same view. Thus, in the contempt proceeding, the trial judge stated (R. 30): "I think in this instance the Court could have, if it desired, proceeded under paragraph (a) of Rule 42 summarily without giving any time at all." But the judge did not certify, as required by Rule 42(a), that he saw or heard the conduct constituting the contempt and that it was committed in his actual presence.

Court and the evidence introduced relative thereto during the trial of Christianson and Paster which resulted in the subsequent contempt proceeding against Nilva." Appendix C, *infra*, p. 17a. Since Rule 42(a) was thus held applicable, the court below felt that the fact that the District Court chose to proceed under 42(b) meant merely that petitioner had "more adequate opportunity to produce evidence in explanation, exculpation or mitigation of his conduct." Appendix C, *infra*, p. 17a. But in the court's view he did not thereby become entitled to any of the benefits of due process and fair treatment which adhere to a normal proceeding under Rule 42(b), a proceeding to which Rule 42(a) would be totally inapplicable.⁷

The decision below as to the relevance of Rule 42(a) is in direct conflict with the ruling of the Court of Appeals for the Fifth Circuit in *Matusow v. United States*, F. 2d , decided January 27, 1956, and with the ruling of the Court of Appeals for the Fourth Circuit in *Bowles v. United States*, 44 F. 2d 115. In the *Matusow* case, the trial judge purported to act solely on the basis of testimony taken before him on various occasions, testimony which indicated that Matusow had perpetrated a fraud in filing an affidavit in the court. This testimony, however, concerned dealings between Matusow and others at points far

⁷ Thus the court said: "The fact that the trial court elected to proceed under Rule 42(b) rather than under Rule 42(a) did not, in our opinion, place Nilva in any stronger position with respect to the admission of evidence to substantiate the charge that his conduct constituted contempt than he would have been in had he been proceeded against under Rule 42(a), although it gave him a better opportunity to defend against the charge." Appendix C, *infra*, pp. 17a-18a.

distant from the place of the trial court. The Court of Appeals for the Fifth Circuit held that Rule 42(a) was inapplicable because the events which formed the basis for the judge's conclusion that Matusow's testimony was perjured took place out of the presence of the trial court.

In the *Bowles* case, the trial judge, on the basis of evidence before the court, had summarily found the defendant guilty of contempt for having falsely represented himself as a practicing attorney. Summary procedure, now codified in Rule 42(a), was held by the Court of Appeals to be inappropriate since the facts which demonstrated the inaccuracy of the representation, facts dealing with the defendant's disbarment, occurred outside the court's presence.

And so in this case it was not enough that the testimony which was thought to demonstrate or bear on the falsity of petitioner's testimony was all given before the trial judge. The facts which bore upon the contumacious nature of petitioner's testimony before the court and his response to the subpoenas were all matters occurring outside the presence of the trial court. Those facts related to the true nature of the records of the Mayflower Distributing Co. at its place of business in St. Paul, Minn., and the extent and good faith of the search of those records in St. Paul which petitioner had made. These were matters which the trial judge could not certify as having seen or heard or as having taken place in his actual presence, as required by Rule 42(a). The ruling below to the contrary is thus in conflict with the *Matusow* and *Bowles* decisions.

Moreover, there was no competent evidence that petitioner's testimony, correctly understood (see p. 22,

infra), was designed to suppress germane records or to delay the conspiracy trial or that such testimony in any other way obstructed the administration of justice. Nor was it within the judicial knowledge of the court that petitioner's testimony was in fact false. See Note, *Falsification as Contempt*, 7 Vand. L. Rev. 272 (1954). There was thus left applicable the basic rule that the mere giving of false and evasive testimony is not contempt in the absence of an obstructive effect on the administration of justice. *In re Michael*, 326 U. S. 224; *Ex parte Hudgings*, 249 U. S. 378.

Rule 42(a), as this Court recognized in *Sacher v. United States*, 343 U. S. 1, 9, "contemplates that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial." As Mr. Justice Black pointed out in that case, this power of summary contempt "grew out of the need for judicial enforcement of order and decorum in the courtroom and to compel obedience to court orders." 343 U. S. at 22. See also *Ex parte Terry*, 128 U. S. 289, 303, and *Offutt v. United States*, 348 U. S. 11, 14. Rule 42(a), in other words, concerns matters of decorum and conduct occurring wholly within the courtroom. To extend it to testimony before the judge as to matters occurring far beyond the confines of the courtroom, as the court below attempted to do, is to expand the rule beyond its intended limitations and to widen unnecessarily the area within which due process requirements can be ignored in contempt proceedings.

The decision below thus raises a significant issue deserving of further review by this Court. The importance of that issue is enhanced by the fact that the

Court of Appeals utilized its erroneous view of the applicability of Rule 42(a) to restrict petitioner's rights in a proceeding instituted and developed solely under Rule 42(b). Never before has a federal appellate court held that a defendant's rights may be restricted solely because he might have been—but was not—prosecuted under another provision of law. A most serious departure from the accepted and usual course of judicial proceedings has taken place which requires the exercise of this Court's powers of supervision.

3. There was a complete absence of any competent evidence to sustain the conviction for contempt.

The court below recognized the rule that in criminal contempt proceedings the defendant is presumed to be innocent and that guilt can be found only on proof beyond a reasonable doubt. 227 F. 2d at 80; Appendix B, *infra*, p. 14a. But the court failed to look for or to find the existence of any competent evidence from which it could be concluded beyond a reasonable doubt that petitioner had given false or evasive testimony or disobeyed the two subpoenas. Indeed, there was no such competent evidence.

The court below, doubtless influenced by misstatements in the Government's brief below (Brief, pp. 3, 10), misconceived the nature of petitioner's testimony which was found to be false and evasive. And it was thereby led to misconceive the nature of the competent evidence which was necessary to sustain the Government's burden of proof. The court stated that petitioner had sworn that he had made a diligent search of the Mayflower records and that "the records he produced were all of the records of purchases except the records which were on file in the United States

Court of Appeals in the Minnesota case." 227 F. 2d at 76; Appendix B, *infra*, p. 7a. The court then proceeded to find, from the evidence adduced in the conspiracy trial, that this supposed testimony of petitioner had been proved false. There was competent evidence, said the court, to demonstrate "the falsity of Nilva's testimony that there were no more records of purchases by Mayflower during the period in question except those on file in the Court of Appeals." 227 F. 2d at 78; Appendix B, *infra*, p. 11a. The court found, moreover, that justice was obstructed by petitioner's testimony "that the records he produced and those which were in the Court of Appeals were the only records in existence relating to the subject matter he was examined about." 227 F. 2d at 79; Appendix B, *infra*, p. 13a.

But as previously noted, *supra*, p. 6, petitioner never in fact testified that he had brought all the records except those on file in the appellate court. He stated merely that he had searched through thousands of records, with the aid of office employees, and had brought those which to the best of his knowledge and ability were required and available. He readily admitted that he may not have examined certain records, a fact of particular relevance in light of his lack of knowledge of bookkeeping methods and of the contents of specific records. See R. 8-20.

Evidence that there were in fact records which were not on file in the appellate court and which were not produced by petitioner was thus inadequate to prove the falsity or evasiveness of petitioner's testimony. The falsity of such testimony could be shown only by evidence that petitioner did not make a diligent search to the best of his ability and that the records which he

admittedly did not bring were withheld in order to frustrate the orders of the court. And only by such evidence could it be demonstrated that petitioner had disobeyed the two subpoenas.

There was, however, no evidence whatever contradicting the testimony of petitioner, testimony which was further illuminated by petitioner in his examination at the contempt hearing (R. 38-67). As he reiterated at that contempt hearing (R. 54), "I produced such items as I could find and that I was told that the Government was interested in in connection with the main lawsuit." There is not one word of testimony by any of the witnesses in the conspiracy trial—even assuming such testimony to be admissible—which denies that petitioner made a diligent search within his capacities or that he intentionally held back any records he knew should be produced. Indeed, the testimony of Peterson and the other conspiracy trial witnesses on which the court below relied was necessarily confined to the issues involved in that trial. Those witnesses were not concerned with or asked about the truth or falsity of petitioner's testimony, a matter which the trial judge said he wanted to keep from the jury. Appendix A, *infra*, p. 2a.

Thus there was a complete failure of proof beyond a reasonable doubt that petitioner was guilty of contempt as charged in the order to show cause. That failure of proof is an important issue meriting the consideration of this Court. Particularly is such consideration appropriate where, as here, the court below has flagrantly and negligently misunderstood the nature of the allegedly false testimony and the character of the evidence essential to demonstrate the guilt of petitioner. That misunderstanding in effect

served to remove from petitioner the presumption of innocence as to the alleged falsity of his actual testimony and to make it unnecessary for the Government to prove such falsity beyond a reasonable doubt.

The facts and issues in these respects were properly presented and urged by petitioner in the court below. Its failure to respond to those facts and issues has made a useless formality out of the appellate review. Here again the supervisory powers of this Court must be invoked in order that petitioner may secure the proper appellate review of his conviction to which he is entitled.

4. Other errors committed below warrant review by this Court.

Certain other errors were committed in the proceedings below which, in conjunction with the above-discussed grounds for review, merit review and correction by this Court:

a. The court below committed plain error in denying petitioner's motion to strike those portions of the supplemental record which had not been incorporated by reference or otherwise introduced into the record of this contempt case. As stated in *United States ex rel. Collins v. Ashe*, 176 F. 2d 606, 607 (C.A. 3),

It is so well established as not to require discussion, however, that a district court of the United States must base its decision on evidence actually in the record of the case and that the appellate tribunal cannot base an adjudication on items of evidence informally offered in the trial court and, though apparently read by it, not made a part of the record.

Moreover, the supplemental record not having been presented to the trial court for inclusion in the record,

the Court of Appeals lacked authority to add it to the record. *Heath v. Helmick*, 173 F. 2d 156 (C.A. 9); *Washington v. United States*, 14 F.R.D. 221 (D.C. Ken.).

b. The trial court erred in denying petitioner sufficient time in which to prepare his defense. Under Rule 42(b), one accused of criminal contempt is entitled to "a reasonable time for the preparation of the defense." While the reasonableness of the time allowed will vary from case to case, the facts here (see pp. 8-9, *supra*) demonstrate that the four days allowed, including a weekend, to permit petitioner to secure counsel and to enable that counsel to familiarize himself with the case and prepare an adequate defense were entirely inadequate. This case involved extensive testimony and multitudinous documents. Due process under Rule 42(b) required that more than four days be allowed to answer so serious and complicated a charge as was here involved. See *United States v. Aberbach*, 165 F. 2d 713, 714 (C.A. 2) (ten days held reasonable); *United States v. McGovern*, 60 F. 2d 880, 882 (C.A. 2) (six days given to answer).

c. The trial court erred in admitting and considering the transcript of testimony by Richard N. Peterson for the additional reason that such transcript, assuming it to be otherwise admissible in the contempt proceeding, involved a mere summation and tabulation made from voluminous records seized from the Mayflower Distributing Co. Unless it could be shown that the original records were destroyed or were otherwise unavailable, the records themselves are the primary evidence of their own existence. Where, as in the contempt proceeding, the existence of such documents is the prime issue, testimony about the documents is

secondary and explanatory only. See 4 Wigmore on Evidence (3d ed.) §§ 1192, 1244(4).

d. Subpoenas No. 60 and No. 178, in calling for the production of "all" records of purchases and sales between certain dates and pertaining to dealings with named individuals, were obviously not intended to produce evidentiary materials but were merely "fishing expeditions" to see what might turn up. As was held by this Court in *Bowman Dairy Co. v. United States*, 341 U. S. 214, 221, one should not be held in contempt under such broad, unlimited subpoenas. The court below erred in holding to the contrary. 227 F. 2d at 80; Appendix B, *infra*, p. 14a.

e. A substantial question exists whether the trial court abused its discretion in sentencing petitioner to imprisonment for a year and a day. In view of the entire record and the nature of the offenses charged, petitioner maintains that the sentence was excessively severe. In no similar reported contempt case has such a long sentence been imposed or sustained. See *Sacher v. United States*, 343 U. S. 1. (six months' sentence); *Offutt v. United States*, 348 U. S. 11 (ten days' sentence reduced by Court of Appeals to forty-eight hours); and see *United States v. Patterson*, 219 F. 2d 659, 660 (C.A. 2).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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February 17, 1956.

APPENDIX A**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
NORTH DAKOTA, SOUTHWESTERN DIVISION****In re: Allen I. Nilva****Criminal No. 8320**

The respondent was represented by Mr. John W. Graff, of the firm of Hoffman, Donahue and Graff, of St. Paul, Minnesota. At the direction of the Court, Mr. Oliver Dibble, Special Assistant to the United States Attorney, of Washington, D. C., appeared on behalf of the Court.

MEMORANDUM OPINION

Allen I. Nilva, attorney, business man, resident of St. Paul, Minnesota, was proceeded against for criminal contempt under Rule 42(b) of the Federal Rules of Criminal Procedure. He was found guilty, first, of giving false and evasive testimony under oath on April 1, 1954, in connection with the trial of the case of U. S. v. Elmo T. Christianson and Herman Paster; second, disobedience to subpoena duces tecum No. 78 directed to the Mayflower Distributing Company, of which he was vice president, and which subpoena was issued in connection with the trial of the case of U. S. v. Elmo T. Christianson and Herman Paster; and, third, of disobedience to subpoena duces tecum No. 160 directed to the Mayflower Distributing Company in connection with the same trial.

The two subpoenas referred to above were issued out of this court and served upon the Mayflower Distributing Company. Nilva, as a nominal vice president of the Mayflower Distributing Company, voluntarily appeared in this court during the trial of U. S. v. Christianson, et al. at Bismarck,

North Dakota, on April 1, 1954, stating that he was there in response to such subpoenas. Subsequently he testified under oath with reference to the existence or non-existence or possession of certain records required by the subpoenas so issued.

As a result of Nilva's evasive testimony on April 1, 1954, this Court found it necessary to impound the records of the Mayflower Distributing Company and cause them to be brought from St. Paul, Minnesota, to Bismarck, North Dakota, for use in the trial of the case of U. S. v. Christianson, et al. Upon the production of the records through impounding thereof by the United States Marshal, it being apparent that Nilva's testimony was evasive or false, or both, the Court ordered Nilva not to leave the jurisdiction of the Court without permission.

Action on the matter was deferred until after the jury verdict in the case of U. S. v. Christianson, et al, because it was the Court's desire that the jury should not learn of the affair during the trial, so that the defendants therein would not be prejudiced by it in any way. There was no doubt that the jurors were not only aware of Nilva's close connection with one of the defendants but also, due to widespread public interest in the trial, were aware of the fact that Nilva had at one time been a co-defendant in the case and had been found not guilty in a previous trial thereof.

Subsequent to the receipt of the jury verdict in U. S. v. Christianson, et al, Nilva was proceeded against under Paragraph (b) of Rule 42 of the Federal Rules of Criminal Procedure through the issuance of an Order to Show Cause why he should not be found guilty of criminal contempt of this Court. At the trial, Nilva was found guilty and was sentenced by the Court to be confined for a period of one year and one day. After the imposition of sentence, Nilva and his attorney asked that the Court stay execution of the sentence and place Nilva on probation. A total stay of 40 days was given within which the Court could consider

Nilva's petition for probation. Since that time, lengthy reports have been presented to the Court by the United States Probation Offices of the District of Minnesota and of the District of North Dakota and many letters have been received by the Probation Officers and by the Court from prominent citizens, asking or suggesting leniency in behalf of Nilva. These have now been considered by the Court and the Court, in addition thereto, has reviewed a complete transcript of all proceedings in which Nilva testified and in which the impounded records, not produced by Nilva, were explained and their importance to the case of U. S. v. Christianson, et al, ascertained.

There is no question in the Court's mind as to Nilva's guilt. He gave false and evasive testimony under oath and voluntarily disobeyed subpoenas No. 78 and No. 160 on the Mayflower Distributing Company, of which he was the vice president and for whom he appeared in Court in response to such subpoenas. That Nilva's actions impeded the administration of justice in the trial of the case of U. S. v. Christianson, et al, is patent from the fact that it became necessary to expend time and expense to impound the records pursuant to the Court's order. The records which he was required to produce were necessary and vital to the trial of U. S. v. Christianson, et al. The only question, then, remaining before this Court is whether Nilva should be confined or if the Court, in the exercise of its discretion, should stay execution of the sentence and place him on probation.

It seems apparent from the record that this is Nilva's first conviction of a criminal offense. The Court is cognizant of the fact that many laymen convicted of a first offense are placed on probation, thus receiving the leniency that either ignorance or youth or inexperience might justify. We have here, however, an attorney at law. While not a member of the bar of this court, he was extended the privilege and courtesy of appearing of counsel in the

case of U. S. v. Christianson, et al. He violated the very foundation of a court officer's oath in what he did. An attorney who violates his oath and who is disobedient to the orders of the Court strikes at the very roots of our court system and damages the general répute of the legal profession. To thus condone by too great leniency a violation so flagrant would not be the administration of justice. It has been ordered that Nilva may never again appear as an attorney in the United States District Court for the District of North Dakota. This Court has no jurisdiction over him elsewhere and expresses no opinion as to what will happen to his right to practice law elsewhere.

This Court is of the opinion that the sentence imposed was a proper and a just one. The petition that the execution of sentence be stayed and that he be granted probation accordingly will be denied and Nilva is ordered to present himself to the United States Marshal for the District of North Dakota at Fargo, North Dakota, on the 7th day of June, 1954, for commencement of service of the sentence heretofore imposed.

IT WILL BE SO ORDERED.

Dated this 3rd day of June, A.D. 1954, at Fargo, North Dakota.

CHARLES J. VOGEL

Judge, United States District Court

APPENDIX B**ALLEN I. NILVA, *Appellant,***

v.

UNITED STATES OF AMERICA, *Appellee.***No. 15224.****UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT.****Nov. 10, 1955.**

John W. Graff, St. Paul, Minn. (Hoffman, Donahue & Graff, St. Paul, Minn. on the brief), for appellant.

Oliver Dibble, Sp. Asst. to Atty. Gen. (Warren Olney III, Asst. Atty. Gen., and William R. Mills, Asst. U. S. Atty., Bismarck, N. D., on the brief), for appellee.

Before Sanborn, Collet and Van Oosterhout, Circuit Judges.

Collet, Circuit Judge.

Allen I. Nilva was convicted of criminal contempt and appeals.

In October, 1952, Elmo T. Christianson, Herman Paster and Nilva were indicted by a Federal Grand Jury for conspiracy to violate the Johnson Act, 15 U.S.C.A. § 1172, prohibiting the interstate transportation of gambling devices. That case will be referred to as the Christianson case. It was charged that the defendants and other coconspirators conspired to transport gambling devices into North Dakota where they were to be operated under the protection of Christianson, who was elected Attorney General of North Dakota in November, 1950, and assumed that office on January 2, 1951. The three defendants were tried in March, 1953. Nilva was acquitted. The jury failed to agree on the guilt or innocence of Christianson and Paster. The date for the retrial of the latter was first set for

March 22, 1954, and later reset for March 29, 1954. It was the Government's theory, which it sought to establish at the first trial and was preparing to prove at the second, that one of the important incidents of the conspiracy was an executed plan to stock-pile a large number of gambling devices of the slot machine variety at St. Paul, Minnesota, in November and December of 1950 and the early part of 1951, to be moved into North Dakota where they were to be operated after Christianson became Attorney General. The Mayflower Distributing Company was a Minnesota corporation wholly owned and controlled by the Defendant Paster. Its principal place of business was at St. Paul. Through it slot machines were bought and sold. Paster and others not involved in the North Dakota case had been indicted, tried and convicted in the United States District Court of Minnesota for violation of the Johnson Act involving the transportation of slot machines into the State of Minnesota. Some of the records of the Mayflower Company had been used as evidence in that case. In the latter part of February, 1954, when preparations for the second trial of Christianson and Paster were being made, the Minnesota case was pending on appeal. See Nilva v. United States, 8 Cir., 212 F. 2d 115. That part of the records of the Mayflower Company which was used in the Minnesota case was on file in the Court of Appeals.

In preparing for the second trial of the Christianson case, in the latter part of February, 1954, the Government obtained a subpoena duces tecum directed to the Mayflower Company for the production, among other things, of its records pertaining to the stock-piling of slot machines during the latter part of 1950 and the early part of 1951, and the sale and distribution of those machines. Another such subpoena was issued March 22, 1954. The return date of the subpoenas was March 29, 1954, the day the second trial of the Christianson case was set at Bismarck, North Dakota. March 29, 1954, the Mayflower records were not produced. Instead, Paster filed a motion to quash the sub-

poenas. The motion was denied and forthwith subpoenas were issued. Whereupon, Paster's counsel stated that the records called for in the subpoenas would be produced. The trial commenced the next day, March 30th, 1954. On the second day of the trial inquiry was made by Government counsel concerning the production of the records and assurance was given by Paster's counsel that they would be produced the next day—April 1, 1954. On April 1, 1954, Nilva appeared in response to the subpoenas. He was vice-president of the Mayflower Company, regularly employed by that company as its attorney and in a business capacity. He was Paster's brother-in-law and, as noted heretofore, a former defendant in the case. Nilva produced some of the records of the Mayflower Company at that time. While the records he produced showed the purchase of some new slot machines, there were no records produced of the purchase and stock piling of used machines. Nilva was sworn as a witness and examined concerning the existence of other records showing purchases of slot machines. He swore that he had made a diligent search of the Mayflower records and that the records he produced were all of the records of purchases except the records which were on file in the United States Court of Appeals in the Minnesota case. The following is an illustrative portion of his testimony:

"Q. Well, did the Mayflower Distributing Company purchase used slot machines during the month of January, 1951? A. Well, now, I can't state whether they did or not. That is a matter that is now involved in the Appellate Court of the Eighth Circuit. You don't want me to answer that. That's a matter that is on appeal now and I don't think it's proper for me to answer that.

"Q. Well, do the records of the Mayflower Distributing Company, Inc., show the purchase of second-hand slot machines during the month of January, 1951? A. Now, Mr. Dibble, the records with reference to that

matter have all been subpoenaed and are in evidence in the Appellate Court.

"Q. Can you answer the question? A. Well, I just answered it to the best of my ability. Any records with reference to those purchases—they are substantial, sufficiently substantial, I can assure you and they are in the Appellate Court."

Being convinced that the foregoing, and other testimony to the same effect, was not true and that there were additional records called for by the subpoena, not on file in the Court of Appeals, and which showed purchases of used slot machines during the period under inquiry, Government counsel requested an order impounding the records, that Federal Bureau of Investigation agents assigned to the case be permitted to examine the records and that those which might be found and which had been called for by the subpoenas be brought into court. The order was granted. The next day, four F.B.I. agents commenced the examination of the records at St. Paul. Many records were found which had been called for by the subpoenas and which were not on file in the Court of Appeals in the Minnesota case. Among them were records showing the purchase by the Mayflower Company, of 198 slot machines, 16 in November, 1950, 94 in December, 1950, 81 in January, 1951, and 7 in February, 1951, whereas the records produced by Nilva showed the purchase of only 78 slot machines between September 20, 1950, and December 29, 1950. As to sales, the records produced by Nilva showed the sale of 64 slot machines between November 16, 1950, and December 28, 1950, and none after January 2, 1951, the effective date of the Johnson Act, whereas the records impounded disclosed the sale of 17 slot machines in November, 1950, 278 in December, 1950, 526 during January, 1951, and one in February, 1951. More than 40 of those shown by the impounded records to have been sold subsequent to January 2, 1951, and not shown in the records produced by Nilva, were sold in North Dakota.

The trial of the Christianson case proceeded, it being necessary, however, for the court to recess for a day to enable the agents of the F.B.I. to complete their examination of the impounded records. As the evidence developed, it appeared to the trial judge that Nilva had testified falsely and had failed to obey the subpoenas. On April 15, Nilva and the other attorneys in the Christianson case were called into the court's chambers and Nilva was instructed not to leave the jurisdiction of the court of North Dakota without permission. Since the Christianson case had not been concluded, the court impressed upon all present the necessity that the public and particularly the jury know nothing about any impending contempt proceeding against Nilva in order that the jury not be influenced thereby. At that time, on April 15, 1954, the court was informed in Nilva's presence that Nilva had consulted an attorney in St. Paul about the impending contempt proceedings.

In the course of the trial of the Christianson case, Agent Peterson of the F.B.I. prepared and testified from a memorandum he made from the impounded records which showed the slot machines purchased by the Mayflower Company during the period inquired of Nilva about on April 1, 1954. The testimony of Agent Peterson indicated the falsity of Nilva's testimony. Bearing upon the willfulness of Nilva's testimony and his knowledge of Mayflower's records, a former employee of Mayflower's, named James Christensen, testified in the Christianson case that shortly before the first trial of that case, when Nilva was a defendant, at Nilva's direction he, (Christensen, a bookkeeper, deleted and falsified Mayflower's records in order to prevent those records showing two sales and deliveries of slot machines to North Dakota after January 2, 1951.

The jury returned a verdict of guilty in the Christianson case April 22, 1954. Thereafter, on April 23, 1954, the trial court issued an order under Rule 42(b) of the Federal

Rules of Criminal Procedure¹ directing that Nilva appear on April 27, 1954, to show cause why he should not be held in criminal contempt for obstructing the administration of justice by (1) giving false and evasive testimony, (2) disobeying subpoena duces tecum No. 78 (issued February 26, 1954) by failing to produce certain therein described records, and (3) disobeying subpoena duces tecum No. 160 (issued March 22, 1954) by not producing certain described records called for by that subpoena.

Nilva appeared with counsel April 27, 1954, and requested a bill of particulars stating what portion of his testimony of April 1, 1954, was false and evasive. The request was denied. Request was then made for more time to prepare for trial. An adjournment was taken until 3:00 p. m. that day, at which time the contempt hearing proceeded before the court. Nilva was found guilty on each of the three charges and judgment was entered sentencing him to imprisonment for one year and one day. From that judgment he appeals.

The first assignment of error is that there was no competent evidence to support the finding that false and evasive testimony was given. The competency of the evidence received and considered is the crux of the assignment, for

¹"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment." Fed. Rules Crim. Proc. rule 42(b), 18 U.S.C.A.

if the facts heretofore stated were shown by competent evidence, the falsity of Nilva's testimony that there were no more records of purchases by Mayflower during the period in question except those on file in the Court of Appeals is obvious. It was the evidence adduced at the Christianson trial, and particularly that of Agent Peterson, which showed that Nilva's testimony was false. A transcript of Peterson's testimony was received in evidence at the contempt hearing. It was objected to on the ground that it was hearsay because Nilva did not have an opportunity to cross-examine Peterson. But Nilva was an attorney of record for the defendant Paster in the Christianson case. He says that he did not participate in the trial and did not sit at the counsel table. But no reason appears why he could not have done so if he had desired. The question is not raised as to whether the extent of his right to cross-examine Peterson as Paster's attorney would have been materially different than it would have been had Nilva been cross-examining the witness in his own contempt proceeding. Since Peterson was testifying in the Christianson case to what the voluminous records showed and that was the reason for considering his testimony in the contempt proceeding, there appears to be no material difference. Whether that be true or not, the fact remains that Peterson could have been called by Nilva for examination and the records were there at the trial, in the custody of the court, available to Nilva at his hearing for the purpose of showing any inaccuracies in Peterson's summarization of them. For that reason no possible prejudice could have resulted from the use of the summarization instead of offering the truckload of exhibits.

The challenge to the competency of the evidence adduced at the Christianson trial in the later contempt proceeding poses another question. May a trial court take cognizance of what transpires in the trial of the case in connection with which the contempt was committed when the criminal contempt hearing is later held, or must all of the incidents

occurring in the previous trial, which show the contempt, be again proved in the contempt hearing? If the acts and conduct which establish the prima facie ground for the contempt charge are established in a proceeding to which the person charged with contempt is a party or of counsel, with adequate opportunity to know the facts and protect himself, there appears to be no sound reason why both he and the court should not be permitted to take cognizance of such evidence in the contempt proceeding without formally reintroducing that evidence. One of the cardinal distinctions between summary contempt proceedings and criminal contempt is that in the former all that is material takes place in the court's presence and no independent inquiry is necessary, whereas in criminal contempt the charge is of such a nature that that which may first appear to be contemptuous may be subject to satisfactory explanation to the extent of exculpation or mitigation. Bowles v. United States, 4 Cir., 44 F. 2d 115; In Matter of Savin, 131 U.S. 267, 9 S. Ct. 699, 33 L. Ed. 150. Complete fairness must be scrupulously observed to the end that one charged with criminal contempt may have full opportunity of explanation and defense, but there is no sound reason under circumstances existing in this case for requiring the reintroduction of evidence which the court has heard and the person charged has either heard or has voluntarily turned his back to keep from hearing.²

The foregoing generalizations should not result in distorting the present issue. The figures given by Peterson were mere summarizations and tabulations made from voluminous records under a well recognized rule of evidence excepting such hearsay testimony from the general rule excluding hearsay. Since the original records were avail-

² In a Supplemental Record filed by the Government in this court, a number of references are made to portions of the record in the Christianson case. Nilva by motion seeks to have those references stricken. For the foregoing reasons that motion is denied.

able in the contempt proceeding, there is no reason why, under the circumstances here presented, Peterson's testimony was not equally admissible as a summarization of voluminous records in both the Christianson case and the contempt proceedings.

The giving of false and evasive testimony does not in itself constitute contempt. The further element of obstruction to the court in the performance of its duty must exist. *Ex parte Hudgings*, 249 U.S. 378, 39 S. Ct. 337, 63 L. Ed. 656; *In re Michael*, 326 U.S. 224, 66 S. Ct. 78, 90 L. Ed. 30; *Howard v. United States*, 8 Cir., 182 F. 2d 908; *Blim v. United States*, 7 Cir., 68 F. 2d 484. But it is not necessary that the giving of false or evasive testimony must completely disable the court from functioning before the obstruction may be dealt with as a contempt. *Howard v. United States*, 8 Cir., 182 F. 2d 908; *United States v. McGovern*, 2 Cir., 60 F. 2d 880. Figuratively speaking, it is not necessary to turn a polecat loose in the courtroom to obstruct the court in the performance of its duty. Nilva says that no obstruction of justice resulted from his conduct. We do not agree. By his testimony he sought to convince the court that the records he produced and those which were in the Court of Appeals were the only records in existence relating to the subject matter he was examined about. He thereby sought to suppress as evidence other germane records, some of which were crucial to the Government's case. The fact that the obstruction which he interposed was overcome by the impounding of the records, their tedious and laborious examination and their transportation to the place of trial, does not make his conduct any less an obstruction. And his conduct did necessitate a delay in the Christianson trial.

It is asserted that there is no competent evidence to support a finding of failure, without adequate excuse, to obey the subpoenas. His failure to produce records called for by the subpoenas was demonstrated by their subsequent

production under the impounding order. There was ample justification for a finding of willfulness.

It is asserted that the subpoenas were invalid in part because they were unreasonably broad, vague and indefinite, and constituted a fishing expedition. They are not subject to those charges. And another answer to this charge is that practically all of the records called for by the subpoenas were later found when the records were impounded and examined.

The contention that the finding of the court that Nilva's failure to comply with the subpoenas obstructed justice was not justified is untenable for the reason that his false and evasive testimony was an obstruction.

In criminal contempt proceedings the defendant is presumed to be innocent, he must be proven guilty beyond a reasonable doubt, he cannot be compelled to testify against himself, he shall, if proceeded against under Rule 42 (b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., be given notice of the charge and the essential facts constituting the contempt charged, described as such, he shall be advised of the time and place of the hearing, allowed a reasonable time for the preparation of his defense, to procure counsel, to present evidence, and to be heard in person or by counsel. Some of these rights Nilva says were denied him. He says he was not given a fair trial. We find no justification for the charge. He claims the specification of the charge was not sufficiently definite. That claim is without merit. He contends that he was denied sufficient time to prepare his defense, was denied the presumption of innocence and denied the right to have his guilt established beyond a reasonable doubt or be acquitted. We find no justification for these contentions.

The punishment imposed is described as grossly excessive. We are asked to modify and reduce it. The defendant had been an attorney for a number of years.

As such he was fully cognizant of the result of his conduct and the effect it might and did have on the conduct of the administration of justice. As an attorney it was his duty to promote, not to obstruct and hinder, the administration of justice. Those considerations the trial court had in mind when the punishment was fixed. Absent an abuse of discretion, the punishment fixed by the trial court will not be disturbed. Conley v. United States, 8 Cir., 59 F. 2d 929. We find no justification for finding such abuse.

The judgment is affirmed.

APPENDIX C**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 15,224.

ALLEN I. NILVA, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

**Appeal from the United States District Court
for the District of North Dakota**

[December 21, 1955.]

On Pétition for Rehearing.

Before SANBORN and VAN OOSTERHOUT, Circuit Judges.

PER CURIAM.

Judge Collett, who prepared the opinion for the Court, died before the appellant's petition for a rehearing was received from the Clerk.

The petition fails to demonstrate that any controlling question of fact or law was overlooked by this Court. The appellant insists that the evidentiary basis for his conviction of criminal contempt is inadequate on the ground that incompetent evidence, consisting of excerpts from the record of the trial of Christianson and Paster, was

received in the contempt proceeding and was relied upon by the District Court.

It was the conduct of Nilva which occurred in the presence of the District Court and the evidence introduced relative thereto during the trial of Christianson and Paster which resulted in the subsequent contempt proceeding against Nilva. The court could, we think, properly have proceeded summarily against Nilva for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. In *Sacher v. United States*, 343 U.S. 1, 11, the Supreme Court said:

"We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power."

The District Court chose to proceed against Nilva at the completion of the trial under Rule 42(b), giving him a more adequate opportunity to produce evidence in explanation, exculpation or mitigation of his conduct. He cannot complain that he was proceeded against under the more favorable rule.

If the conduct of Nilva, found to have been both consummatory and obstructive, had been committed outside the presence of the court, the introduction of the evidence of which Nilva complains would present a serious question.

The fact that the trial court elected to proceed under Rule 42(b) rather than under Rule 42(a) did not, in our opinion, place Nilva in any stronger position with respect to the admission of evidence to substantiate the charge that his conduct constituted contempt than he would have been in had he been proceeded against under Rule 42(a),

although it gave him a better opportunity to defend against
the charge.

We think the District Judge was entitled to consider what had occurred in his presence during the trial of Christianson and Paster as shown by the record in so far as it characterized the conduct of Nilva, and therefore did not err in receiving in evidence the excerpts from the record of the trial, of which Nilva complains. We adhere to our opinion that there was an adequate factual and legal basis for the judgment and sentence from which this appeal was taken.

The petition for a rehearing is denied.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. 702 37

ALLEN L. NILAN, Petitioner,

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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Counsel for Petitioner.

March 27, 1956.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 702

ALLEN I. NILVA, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

Petitioner files this brief in reply to the brief for the United States in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

The United States opposes the grant of certiorari in this case on the sole ground that petitioner's general sentence of a year and a day in prison may be sustained on the basis of specification No. 3 alone, the specification which charged him with having willfully

disobeyed a subpoena and the order of the court for the production of certain records of the Mayflower Company (Brief, p. 11). It is said that the petitioner's principal contentions relate to the proof on specification No. 1 that he gave false and evasive testimony and that those contentions need not be reached in view of the sufficiency of the proof and the propriety of the procedure as to specification No. 3. The United States makes no attempt to sustain the conviction by reference to the proof or procedure as to specification No. 2 (see Brief, p. 17, fn. 7).¹

But the effort to sustain the conviction by reference to specification No. 3 alone is completely misplaced. The United States relies in this respect upon the doctrine that a general verdict or judgment in a criminal case on an indictment containing several counts cannot be reversed if any one of the counts is good and warrants the sentence imposed. *Pinkerton v. United States*, 328 U.S. 640, 641-642, fn. 1; *Hirabayashi v. United States*, 320 U.S. 81, 85. But the reason for this rule, as explained by this Court in *Claasen v. United States*, 142 U.S. 140, 146-147, and referred to in the *Pinkerton* case, is that "in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only." Or, as stated by this Court in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 440,

The rule originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that

¹ The United States admits that there was no proof that the particular records referred to in specification No. 2 were actually in existence at the time the subpoena was served.

the judge ignored the finding of the jury on the bad counts, and sentenced only on those which were sufficient to sustain the conviction.

In the instant case, however, there is no warrant in the record for the presumption that the sentence was awarded on specification No. 3 only. The trial judge specifically found petitioner "guilty of criminal contempt as set forth in the Order to Show Cause *insofar as the three specifications therein are concerned*, and it specifically finds that the acts of the defendant [petitioner] which constitute criminal contempt did obstruct the administration of justice" (R. 67, emphasis added). The sentence of imprisonment for a year and a day was thereupon imposed without reference to or without being broken down as to any particular specification (R. 67). And in the formal judgment and commitment (R. 67), the trial court found that petitioner gave false and evasive testimony as specified in specification No. 1, that he disobeyed subpoena duces tecum No. 78 as specified in specification No. 2, and that he disobeyed subpoena duces tecum No. 160 as specified in specification No. 3. The formal order thereupon reads:

WHEREFORE, it is adjudged that Allen I. Nilva is guilty of criminal contempt of the authority of this Court; and it is

ORDERED that Allen I. Nilva is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of One (1) year and One (1) day; . . .

Obviously, then, there is no room here for the presumption that the sentence of a year and a day was imposed solely on the basis of the third specification

or that the first two specifications were ignored by the trial judge in imposing the sentence. The case here is precisely like the situation in the *Gompers* case, where this Court said (221 U.S. at 440) :

But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts, he consolidated the sentence without indicating how such of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that, having found them guilty of these nine specific acts, he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

See also *Stromberg v. California*, 283 U.S. 359, 368; *Williams v. North Carolina*, 317 U.S. 287, 291-292.

In other words, if the sufficiency of the proof or the propriety of the procedure as to any one of the three specifications in this case is legally suspect, the conviction cannot stand. It cannot be said that the general sentence of a year and a day was unaffected by the first two specifications. But for the finding of guilt as to either of the first two specifications, the sentence imposed might have been less severe.

Thus it is that the patent failure of the trial court to insist upon the full due process requirements of Rule 42(b) cannot be ignored.² It is an error which the United States virtually concedes (Brief, pp. 15-16) in remarking that "there may well have been a violation of the rule of confrontation which was not cured by the fact that petitioner was attorney of record at the Christianson retrial, since he presumably would not have been able to cross-examine as to matters not relevant to the issues at that trial and at a time when these contempt proceedings had not been initiated." It is an error which is magnified by the direct conflict existing between the decision below and that of the Court of Appeals for the Fifth Circuit in *Matusow v. United States*, decided January 27, 1956, a conflict which the United States makes no attempt to deny. Clearly, the basis for the exercise of this Court's jurisdiction by way of certiorari is present in this case.

² At page 15 of its Brief, the United States contends that petitioner had been given access to all the impounded Mayflower records before the contempt hearing and that he therefore had an opportunity to check Peterson's testimony with these records and to call him as a witness at the contempt hearing. But the court's order giving petitioner access to these records was made just before a recess in the contempt hearing, a recess which permitted but two or three hours to examine these voluminous records (R. 35). Moreover, at this point the Government had not sought to introduce the transcript of Peterson's testimony. Petitioner thus had no way of knowing that Peterson's testimony would be relevant or that it would be important to check the records against his testimony.

For the foregoing reasons and for the reasons set forth in the petition for a writ of certiorari, it is appropriate for a writ of certiorari to issue in this case.

Respectfully submitted,

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Counsel for Petitioner.

March 27, 1956.

~~SUPREME COURT, U.S.~~

Office - Supreme Court, U.S.
FILED

SEP. 27 1956

JOHN T. FEY / Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 87

ALLEN I. NILVA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE PETITIONER

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September 27, 1956

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IN THE
Supreme Court of the United States

October Term, 1956

—
No. 37
—

ALLEN I. NILVA, *Petitioner*

V.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

—
BRIEF FOR THE PETITIONER
—

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (S.R. 72)¹ is reported at 227 F. 2d 74. The opinion of that court on the denial of the petition for

¹ The record before this Court is divided into two portions with different paginations. The record compiled at the contempt hearing in the District Court consists of the first 107 pages and is referred to throughout this brief as "R." The supplementary record, filed in the Court of Appeals by the Government, consists of 68 pages and has its own pagination. This supplementary record is referred to in this brief as "S.R." The proceedings in the Court of Appeals, including the opinions of that Court, are printed immediately following the supplementary record and utilize its pagination. Thus all references to the opinions of that Court are to "S.R."

rehearing (S.R. 99) is reported at 228 F. 2d 134. A memorandum opinion of the District Court (S.R. 48) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955, (S.R. 82), and a petition for rehearing was denied on December 21, 1955 (S.R. 100). On January 16, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 18, 1956 (S.R. 101). The petition for a writ of certiorari was filed on February 17, 1956, and was granted on April 2, 1956. 350 U.S. 1005. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a criminal contempt conviction under Rule 42(b) of the Federal Rules of Criminal Procedure can be premised exclusively on prior testimony not introduced at the contempt hearing and not subject to cross-examination by counsel for the accused.
2. Whether Rule 42(a) of the Federal Rules of Criminal Procedure is applicable where the testimony before the court on the contumacious acts relates to events occurring outside the courtroom and whether, in any event, the applicability of Rule 42(a) can be used to narrow the rights accruing to a defendant in a proceeding instituted under Rule 42(b).
3. Whether petitioner's conviction for contempt can be sustained in the absence of any competent evidence establishing guilt beyond a reasonable doubt.

4. Whether other errors were committed in the proceedings below which warrant reversal or reconsideration of the conviction.

STATUTE AND RULES INVOLVED

18 U.S.C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Pertinent Federal Rules of Criminal Procedure are as follows:

Rule 17. Subpoena.

* * * *

(c) For Production of Documentary Evidence And Of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or

portions thereof to be inspected by the parties and their attorneys.

* * * * *

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issues if it was issued by a commissioner.

* * * * *

Rule 42. Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding

of guilt the court shall enter an order fixing the punishment.

STATEMENT

On April 27, 1954, the United States District Court for the District of North Dakota found the petitioner, an attorney, guilty of criminal contempt (R. 67). The acts constituting such contempt, the court further found, "did obstruct the administration of justice in the trial of the case of United States of America, plaintiff, against Elmo T. Christianson and Herman Paster" (R. 67). Petitioner was thereupon sentenced to imprisonment for a year and a day (R. 67). On appeal, the conviction was affirmed by the Court of Appeals for the Eighth Circuit (S.R. 82), 227 F. 2d 74, and a rehearing petition was denied on the basis of a written opinion (S.R. 99), 228 F. 2d 134.

This contempt proceeding had its origins in the retrial of Christianson and Paster on charges of conspiring to violate the Act of Congress of January 2, 1951, known as the Johnson Act (15 U.S.C. 1171-1177).² This Act prohibits the interstate shipment of gambling devices. In preparation for the retrial, which began on March 29, 1954, the District Court, at the request of the Government, issued two subpoenas duces tecum. They were directed to the Mayflower Distributing Co. of St. Paul, Minn., a corporation wholly owned by Paster. Subpoena No. 78 was issued on February 26, 1954 (R. 26) and Subpoena No. 160 was issued on March 22, 1954 (R. 24). Both required that the corporation produce at the retrial certain books

²At the first trial, the jury had been unable to agree as to the guilt of Christianson and Paster and a mistrial was declared. Petitioner Nilva was acquitted at this first trial and hence was not involved in the retrial.

and records reflecting the purchase and sale of new and used coin-operated or gambling devices (R. 24-27). They were returnable March 29, 1954, the date set for the retrial. Service of the subpoenas was effected in both instances on Walter D. Johnson, Secretary-Treasurer of the Mayflower Distributing Co. (R. 25, 28).

The Court of Appeals noted that the subpoenaed records were not produced on March 29, the return date. Instead, the defendant Paster moved on that day to quash the subpoenas as violative of his privilege against self-incrimination (S.R. 21). This motion was denied (S.R. 25). The Government thereupon orally moved, under Rule 17 (c) of the Federal Rules of Criminal Procedure, that the books and records designated in the subpoenas be produced forthwith and the court so ordered (S.R. 27). Counsel for the defendant Paster indicated that the order would be obeyed (S.R. 26) and several days later, when Government counsel inquired as to when the records would be produced, Paster's counsel stated that this would be done the following day, April 1 (R. 5).

On April 1, 1954, the third day of the Christianson-Paster retrial, petitioner, who was an attorney and vice-president of the Mayflower Distributing Co., voluntarily appeared in answer to the two subpoenas and the forthwith order (R. 8-9). He did so after being requested by Johnson, the secretary-treasurer of the corporation, to compile the requested documents (R. 41, S.R. 40). An informal conference was held on that day in the trial judge's chambers (R. 5). Government counsel indicated the belief that petitioner had not produced all the subpoenaed records; what was produced related only to new machines and not to used

machines (R. 6). Petitioner was thereupon put under oath and examined by Government counsel (R. 5). He testified that he was the vice-president of the Mayflower Distributing Co. (R. 8) and that he had "brought all the records that (he) could that those subpoenas asked for" (R. 9). He testified further (R. 9) to the effect that many of the requested records had been subpoenaed for use in another criminal proceeding then pending before the Court of Appeals for the Eighth Circuit.³ And he stated that he was but a nominal officer of the corporation and was not the best qualified to testify as to the bookkeeping records (R. 11).

Petitioner also described the magnitude of the task of attempting to comply with subpoenas of such breadth through a search of "thousands" of records (R. 17-19). He readily admitted that he may not have examined daily ledgers and he declined to state that he had examined monthly journals (R. 17). He unhesitatingly acknowledged that purchases of new equipment would be shown in running accounts rendered by the manufacturers from whom such purchases were made, and that records of such accounts could easily be found among Mayflower's records (R. 20). But he never suggested that such accounts and records had been produced. Moreover, petitioner made it clear that he had not personally conducted the entire search but had been assisted by office employees (R. 9, 15; 17). He expressly denied any knowledge of bookkeeping methods or of the contents of specific records (R. 9; 10, 17, 19). Repeatedly he refused to respond categorically to questions as to the contents of corporate records and he qualified his answers as to the research

³ *Nilva v. United States*, 212 F. 2d 115 (C.A.8), cert. den., 348 U.S. 825. The appellant in that case was Samuel George Nilva, not the petitioner in the instant proceeding.

he had made as being thorough "to the best of my ability" (R. 14, 15, 16, 18). Nowhere did he claim to have produced any specific records other than "compiled" records relating to used machines and all "incoming invoices" for certain months relating to new machines (R. 8, 18).

The trial judge later stated (S.R. 48)⁴ that at its conclusion he had considered petitioner's testimony at this April 1 hearing to be evasive and accordingly he had granted the Government's request for an order impounding all records of the Mayflower Distributing Co. at its place of business in St. Paul, Minn. The records thus impounded, according to the contested supplementary record (S.R. 34), consisted of "thousands and thousands of documents" filling more than a "post office truckful". On April 2, 1954, F. B. I. agents started an examination of the impounded records (R. 70). And on April 8 the Government asked for and received a recess of one day in the Christianson-Paster retrial in order that these documents might be further examined and analyzed (S.R. 35).

The Christianson-Paster retrial proceedings resumed and, on April 12, 1954, one Richard N. Peterson, an F. B. I. agent, "testified from a memorandum he made from the impounded records which showed the slot machines purchased by the Mayflower Company during

⁴ This statement was made in the judge's memorandum opinion denying the motion for suspension of the sentence, an opinion which was rendered after the entry of the contempt judgment and which appears in the contested supplementary record (S.R. 48-50). It has been held that an opinion announced after the verdict is rendered which states merely the course of reasoning which conducted the court to its judgment "may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record." *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 118.

the period inquired of Nilva about on April 1, 1954" (227 F. 2d at 77; S.R. 76). He testified further as to the sales of slot machines by Mayflower during the period in question which were revealed by the impounded records. There was also testimony at the retrial by one James Christensen, a former book-keeper of the Mayflower Distributing Co., to the effect that certain ledger sheets were incomplete and that under instructions from petitioner, prior to the first trial, he had removed certain invoices and replaced them with slips of paper (S.R. 36-37). Those slips of paper were assertedly found among the impounded records.

On April 15, 1954, petitioner voluntarily appeared before the trial judge in chambers (S.R. 39). The judge ordered him not to leave the court's jurisdiction without permission and petitioner replied that he would "be pleased to comply with the order" (S.R. 39). Petitioner was then ordered to produce the records that he had previously brought in answer to the two subpoenas (S.R. 43). After petitioner stated that he was not seeking to assert any legal technicalities and didn't need any lawyer to represent him, the court repeated its order to refrain from leaving its jurisdiction without permission (S.R. 44). The court also warned those in the room not to report anything with reference to these proceedings or to the order enjoining petitioner from leaving the jurisdiction without permission so that the matters would not get in the newspapers or come to the attention of the jury (S.R. 44). At no point, however, was petitioner specifically told or warned that he was to be subjected to a contempt citation. The court later remarked (R. 34-35), however, that "Nilva was well aware of the fact that a proceeding of this type was contemplated because

he was ordered to remain within the jurisdiction of the Court until that case was over with and at that time he did state in chambers that he was an attorney and he did not need an attorney to represent him. The only reason the proceedings did not go forth at that time was because I feared it might affect the jury before whom we were trying the preceding case."

In the subsequent words of the trial judge (S.R. 48-49) : "Action on the matter was deferred until after the jury verdict in the case of *U. S. v. Christianson, et al.*; because it was the Court's desire that the jury should not learn of the affair during the trial, so that the defendants therein would not be prejudiced by it in any way. There was no doubt that the jurors were not only aware of Nilva's close connection with one of the defendants but also, due to widespread public interest in the trial, were aware of the fact that Nilva had at one time been a co-defendant in the case and had been found not guilty in a previous trial thereof".

Christianson and Paster were found guilty of the alleged conspiracy on April 22, 1954 (S.R. 20).⁵ On the following day, April 23, 1954, the court pursuant to Rule 42 (b) of the Federal Rules of Criminal Procedure issued an order to show cause (R. 2-4) why petitioner should not be held in criminal contempt for obstructing the administration of justice by:

(1) Giving false and evasive testimony under oath on April 1, 1954, upon answering, as vice-president of the Mayflower Distributing Co., subpoenas duces tecum

⁵ The conviction of Christianson and Paster was affirmed on appeal by the Court of Appeals for the Eighth Circuit. *Christianson v. United States*, 226 F. 2d 646. This Court denied certiorari. 350 U.S. 994.

directed to that company in the Christianson-Paster criminal case.

(2) Disobedience to subpoena duces tecum No. 78, in that five named articles were not produced as required thereby.

(3) Disobedience to subpoena duces tecum No. 160, and disobedience to the court order made on March 29, 1954, in that twenty-two named items were not produced as required thereby.

The order, which was issued on Friday, April 23, 1954, was returnable on Tuesday, April 27, at 10 A. M. (R. 2). At the hearing on the morning of April 27, the court stated to petitioner's counsel that "This being an order to show cause . . . I believe the burden is on you to proceed" (R. 29). Petitioner's counsel asked for additional time (R. 29-30) in order to prepare a proper defense. It was explained that other commitments of counsel had prevented more than a brief contact with petitioner during the preceding four days, which included a week-end. The request for additional time was denied except to the extent that the matter was continued until 3 P. M. that same day. During the morning hearing, petitioner's request for a bill of particulars (R. 32, 36) as to the first specification of contempt—the giving of false and evasive testimony—was also refused (R. 36-37). It was ordered, however, that petitioner's counsel be given access during the short recess to all of the Mayflower records that had been impounded by the court (R. 35).

At the afternoon hearing, the transcript of petitioner's testimony of April 1, 1956, a copy of which he acknowledged receiving on April 16, was made part of the record in the contempt proceeding at petitioner's

request, together with subpoenas No. 78 and No. 160 (R. 38). Petitioner thereupon testified in his own behalf (R. 38-58), introduced fifteen exhibits, and was cross-examined by Government counsel (R. 62-67). Petitioner's testimony revealed that he was nominally a vice-president of Mayflower Distributing Co. and that, as an attorney, he handled minor legal matters, collection matters, contracts, purchases of real estate, leases and the like (R. 39-40). He was a brother-in-law of Herman Paster, the sole owner of the corporation (R. 40). The subpoenas, petitioner testified, had been served on Walter D. Johnson, the secretary-treasurer of the Mayflower Distributing Co. (R. 40-41). It had been understood that Johnson would compile the records demanded by the subpoenas and "it was his duty to comply therewith" (R. 41). Petitioner attempted to compile the requested records only after Johnson had left town to attend the conspiracy trial and phoned petitioner a few days before the return date (R. 41; S.R. 40), although petitioner previously had searched the records as well. (R. 42).

After petitioner testified that he was not an accountant and never did any accounting work (R. 43), the following colloquy took place between petitioner and his counsel concerning the first specification of contempt—his allegedly false and evasive testimony of April 1, 1954 (R. 44-45):

A. Well I had no thoughts of any evasion of any kind. I had no ulterior motives or any ideas of any kind except to produce what I had brought and turn it over.

Q. You were not reluctant to produce any records that were requested by the Court?

A. No, sir.

Q. Did you at any time in the statement which was taken from you on April 1, 1954, in the Court's chambers refuse to produce any records which were requested of you?

A. No, sir, I did not.

Q. Was there any record specifically requested of you at that time which you had failed to bring?

A. I don't believe there was any particular item requested or any particular record requested that I refused to bring, sir.

Q. Did you knowingly make any false answer to the questions put to you, either by Government Counsel or by the Court at the hearing on April 1, 1954?

A. No, I did not, sir.

Q. Is it your position now that you made then no false answers to any questions which were asked of you?

A. It's my position that I made no false answers of any kind.

Q. If any answer you gave was incorrect, it was not done knowingly?

A. That is correct, sir.

As to the second specification of contempt—the alleged failure to produce five specific items under the terms of subpoena No. 78—petitioner testified (R. 54-58) that he had produced whatever he was able to find pursuant to that subpoena. The items he had produced in answer to the subpoena were introduced into the record of the contempt proceeding (R. 55-58). But no effort was ever made by the Government to produce the five specific items mentioned in the second specification of contempt. Nor was any proof introduced that such items were even in existence at the time subpoena No. 78 was issued and served.

With reference to the third specification of contempt—the alleged failure to produce twenty-two items

assertedly covered by subpoena No. 160—the items in question had presumably been impounded under the court order of April 1, 1954, and may have been among the many records physically present before the court at the contempt hearing. Petitioner admitted that he had not produced these items pursuant to the subpoena (R. 46-54) but testified as to particular items that he either couldn't find them during his search, or that he had brought all the records he could find and that he thought were required by the subpoena, or that he had not checked specific files that the subpoena had failed to mention by name (R. 46-54). Some of the records that he could not find had been "buried" in the basement so that not even the federal agents acting under the impounding order could find them without Paster's aid (R. 49, 52). He denied categorically (R. 58) that he intentionally or knowingly failed to produce any records called for by either subpoena.

Government counsel presented no witnesses and introduced no evidence at the contempt hearing apart from moving that the transcript of testimony of Richard N. Peterson, the F. B. I. agent, at the Christianson-Paster conspiracy trial (R. 68-100) be made a part of the contempt proceeding record (R. 59). Petitioner's counsel objected to the introduction of this transcript on the ground of hearsay and lack of opportunity to cross-examine Peterson (R. 59-61). The objection was overruled and the transcript was admitted (R. 61). In connection with this ruling the following colloquy took place (R. 60-61):

Mr. Dibble (Government attorney): I think that it [the transcript of Peterson's testimony] was part of the record of this Court and it was made in the presence of the Court. It constitutes part of

the record to establish the importance of the records that Mr. Nilva did not bring in.

The Court: Well, that seems proper to the Court. In fact, it seems to me that in this proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt arose out of the respondent's actions in the case of *United States v. Christianson, et al.*

* * * * *

The Witness (Petitioner): Can I intercede, Your Honor? I was not present at any of the testimony of Mr. Peterson and none of his testimony was within my hearing.

Mr. Dibble: This is a proceeding to determine whether the respondent is in contempt of this Court and the thing that is material is the knowledge that the Court has in this proceeding and everything that is material which has come to the Court's attention I think can properly be made a part of this record. The Court would not be in a position to determine whether the contempt had been committed in the presence of the Court if the Court didn't take into consideration the record in the other case where the contempt was committed.

Mr. Graff (Petitioner's counsel): Certainly if that is the position of counsel, it isn't apparent from the Order to Show Cause which was issued by this Court. If I read it correctly—and I think I do—it has three specifications: 1, giving false and evasive testimony on April 1st; 2, disobedience to subpoena No. 78; 3, disobedience to subpoena No. 160. Now, that is the basis upon which we are in court, not the proceedings in the criminal case.

The Court: I think the record in this proceeding ought to disclose the fact that this respondent was an attorney of record for the defendant Paster in the case we have just completed trying. The objection is overruled.

The Witness: Well, Your Honor, if I might intercede here, this is news to me that I was an attorney of record. If I was placed thereon, it was probably, I believe, at the very outset and I think one of the first motions and I thereafter withdrew and had no part in any of the proceedings whatsoever. I never sat at the counsel table. I never took part in any of the litigation.

Mr. Graff: Mr. Nilva, I am quite sure that the Court appreciates that.

At the conclusion of petitioner's testimony, the court remarked (S.R. 45) that petitioner's record was not unblemished in that he had been a defendant in the first conspiracy trial and "had he been a defendant in the case as it was tried this time, I don't think he would have been so fortunate". The court thereupon found petitioner "guilty of criminal contempt as set forth in the Order to Show Cause insofar as the three specifications therein are concerned, and it specifically finds that the acts of the defendant which constitute criminal contempt did obstruct the administration of justice in the trial of the case of United States of America, plaintiff, against Elmo T. Christianson and Herman Paster" (R. 67). Petitioner was sentenced (R. 67) to imprisonment for a year and a day. It was also ordered, though not as a part of the sentence, that petitioner never again be allowed to practice in the District Court in North Dakota (R. 67).

The judgment and commitment of the court (R. insert page between p. 66 and p. 67) likewise found that petitioner had (1) given false and evasive testimony under oath on April 1, 1954, (2) disobeyed, without adequate excuse, subpoena duces tecum No. 78, and (3) disobeyed, without adequate excuse, subpoena duces tecum No. 160, and disobeyed, without adequate

excuse, the court order of March 29, 1954. It was found that "by each of the foregoing acts, petitioner had obstructed the administration of justice" and "WHEREFORE, it is adjudged that Allen I. Nilva is guilty of criminal contempt of the authority of this Court; and it is ORDERED that Allen I. Nilva is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of One (1) year and One (1) day."

Petitioner appealed to the Court of Appeals for the Eighth Circuit. In that court the Government filed a so-called Supplementary Record of some sixty-eight pages (S.R. 1-68) consisting almost exclusively of pleadings, orders, exhibits, transcripts of testimony and other proceedings in the record of the Christianson-Paster retrial. With the exception of certain excerpts from the testimony given in the District Court at the contempt hearing and the further exception of a list and summary of exhibits introduced at that hearing, none of the material presented in the Supplementary Record was a part of the record before the District Court in petitioner's contempt case. None of it was described in the official docket entries of the contempt case. And, with the exceptions just noted, none of the material in the Supplementary Record was incorporated as part of the record in the contempt case by any order of the District Court.

Petitioner filed in the Court of Appeals a motion to strike those portions of the Supplementary Record which had not been made a part of the record in the contempt proceeding before the District Court (R. 69-72). In its opinion affirming petitioner's conviction, the Court of Appeals denied this motion. S.R. 79, 227 F.2d at 79, fn. 2.

The Court of Appeals was unanimous in its action affirming the judgment of the District Court. S.R. 72, 227 F. 2d 74. It held that petitioner's conviction under Rule 42 (b) could be based exclusively on prior testimony given in the conspiracy trial and not introduced in the contempt proceeding since the petitioner was an attorney of record in the conspiracy case and could have cross-examined any witness in that case whose testimony was relevant to the contempt or he could have called such witness for cross-examination at the contempt hearing. In reaching this conclusion, the court relied in part upon material contained in the Supplementary Record which had not been introduced in the proceedings before the District Court.

The Court of Appeals also issued an opinion denying a petition for rehearing filed by petitioner. S.R. 99, 228 F. 2d 134. In that opinion the court held that petitioner was in no position to complain about the use of the prior testimony given in the conspiracy trial since he could have been subject to the summary procedure of Rule 42 (a). The Court conceded (S.R. 100) that "if the conduct of Nilva, found to have been both contumacious and obstructive, had been committed outside the presence of the court, the introduction of the evidence of which Nilva complains would present a serious question." But since the court felt that the contempt occurred in the trial court's presence and that Rule 42 (a) could therefore have been applied, it concluded that petitioner could not object to the introduction of any evidence against him.

* Thus the court stated (S.R. 76) that the willfulness of Nilva's testimony and his knowledge of Mayflower's records were shown by the testimony of James Christensen, testimony which appeared in the Supplementary Record (S.R. 36-37) but which was not introduced or even referred to at the contempt hearing.

SUMMARY OF ARGUMENT

Petitioner, having been cited for criminal contempt under the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, was entitled to all the due process protections explicit and implicit in that rule. Under that rule it was necessary that the criminal contempt proceeding be conducted as an independent proceeding, separate and apart from the original case out of which it may have arisen. All of the evidence upon which the prosecution seeks to overcome the presumption of innocence and to prove guilt beyond a reasonable doubt must be presented at the contempt hearing. Only in that way can the defendant be assured of the right to be confronted with the evidence and the witnesses against him and to cross-examine and refute such evidence. In this case, however, petitioner's conviction on all three specifications of contempt was premised exclusively on prior testimony and events not introduced or referred to at the contempt hearing and not subject to cross-examination at the contempt hearing by counsel for the petitioner. Due process in its most elemental form was denied petitioner.

Since the allegedly contumacious acts all occurred outside the presence of the trial court, the summary contempt procedures authorized by Rule 42(a) were inapplicable. In any event, the proceeding here was instituted exclusively pursuant to Rule 42(b) and the court below erred in holding that the due process elements that adhere to that rule could in any way be lessened by the applicability of a summary procedure that the trial court had elected not to pursue.

There was a complete absence of evidence to sustain the conviction of petitioner on any of the three specifications of criminal contempt. As to the first speci-

fication of having given false and evasive testimony, the record affirmatively shows that such testimony was not false or evasive and there is no evidence to the contrary. Moreover, there was no proof that such testimony—apart from the non-production of the records called for by the subpoenas—constituted an obstruction of justice. The testimony itself constituted no more than perjury, as to which a contempt prosecution will not lie. As to the second and third specifications of having failed to produce the records called for by the subpoenas, the record is devoid of proof that such records were actually in existence at the time the subpoenas were served, that they were readily accessible to petitioner or that they were within the intended reach of the subpoenas. Moreover, petitioner's testimony as to having made a good faith search for the records called for by the subpoenas constituted an "adequate excuse" for the non-production in view of the uncontested fact that he was a mere nominal officer of the corporation to which the subpoenas were directed and in view of the lack of proof that he was the custodian of the corporate records.

Other errors were committed which warrant reversal of the conviction below: (1) the Court of Appeals committed plain error in admitting and considering a supplementary record which had not been incorporated or introduced into the record before the trial court; (2) the trial court denied petitioner sufficient time in which to prepare his defense; (3) the trial court erred in admitting and considering a transcript of testimony that was secondary and explanatory only; (4) the subpoenas, in calling for the production of all documents relating to certain sales or individuals, without regard to whether such documents were relevant to the prose-

cution of a crime under the Johnson Act, were mere fishing expeditions which do not justify holding one in contempt for disobedience thereof; and (5) the trial court plainly abused its discretion in imposing a sentence of a year and a day under the circumstances of this case.

ARGUMENT

1. PETITIONER WAS DENIED THE DUE PROCESS RIGHTS GUARANTEED BY RULE 42(b)

The contempt proceeding against petitioner was non-summary in nature and was instituted exclusively under Rule 42(b) of the Federal Rules of Criminal Procedure (R. 2, 28). He was charged with and found guilty of three specifications of contempt. As to each of these three specifications, however, there was a glaring, patent failure by the District Court to observe the due process requirements of Rule 42(b). That failure was condoned and magnified by the Court of Appeals to an unwarranted and unprecedented degree. It therefore becomes appropriate, in the exercise of its supervisory power over proceedings in lower federal courts, for this Court to reverse the judgment below.

a. The impact of Rule 42(b) on this proceeding.

Rule 42(b) in substance provides that a criminal contempt shall be prosecuted, except in the circumstances to which Rule 42(a) is applicable, upon notice and hearing. A reasonable time must be allowed for the preparation of the defense and the notice must state and describe the essential facts constituting the criminal contempt charged.

Rule 42(b), as promulgated by this Court in 1944, is thus a codification of the due process requirements which the Court had long insisted upon in criminal

contempt proceedings. As stated in *Cooke v. United States*, 267 U.S. 517, 537: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, require that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

Moreover, the hearing contemplated by Rule 42(b) necessarily means a hearing in its fullest due process connotations. While due process of law is not a fixed concept unyielding as to time, place or circumstances, no consideration has yet justified itself which would in any way limit the application in non-summary contempt proceedings of all the deep-rooted demands of fair play enshrined in the concept of due process. The undoubted tendency has been, as noted in *Matusow v. United States*, 229 F. 2d 335, 345 (C.A. 5), "to observe, as far as may be, in the narrowly restricted area conceded to be covered by Rule 42(b), the protections given to defendants in criminal trials under the Bill of Rights." See *In re Michael*, 326 U.S. 224, 227.

Whether these due process elements are required as a matter of constitutional right under the Fifth or Sixth Amendment need not here be decided. Cf. *Blackmer v. United States*, 284 U.S. 421, 440; *Myers v. United States*, 264 U.S. 95, 104-105; *Merchants Stock & Grain Co. v. Board of Trade*, 201 F. 2d, 28-29 (C.A. 8). It is enough that this Court is called upon to determine the nature of a hearing required by a procedural rule promulgated by it. And, in the exercise of its

supervisory power over lower federal courts, this Court is now charged only with the necessity of determining how contempt proceedings in those courts shall be fairly conducted within the confines of Rule 42(b). In such a context, the hearing contemplated by Rule 42(b) should be construed with "regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." *Morgan v. United States*, 304 U.S. 1, 19.

Rule 42(b), in other words, should be interpreted and applied so as to conform to "those fundamental requirements of fairness which are of the essence of due process." And for present purposes it is relevant to emphasize that fairness demands that a criminal contempt proceeding under that rule be conducted as an independent proceeding, separate and apart from the original cause out of which the contempt arose. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 445, 451; *Michaelson v. United States*, 266 U.S. 42, 64-65; *Parker v. United States*, 153 F. 2d 66, 70 (C. A. 1); *Russell v. United States*, 86 F. 2d 389, 392 (C. A. 8); *United States v. Bittner*, 11 F. 2d 93, 95 (C. A. 4); *S. Anargyros v. Anargyros & Co.*, 191 F. 208, 210 (N.D. Cal.).

This complete separateness of a criminal contempt proceeding is of vital importance in assuring fairness to the contempt defendant. It is uniformly recognized that in such a proceeding "the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444; *Michaelson v. United States*,

266 U.S. 42, 66. To insure that such substantial rights and constitutional privileges are respected it is manifestly necessary that the contempt proceeding not be intermingled in any way with the cause out of which the contempt arose. The record in the contempt proceeding must be complete in and of itself; all of the evidence upon which the prosecution seeks to overcome the presumption of innocence and to prove guilt beyond a reasonable doubt must be presented at the contempt hearing. Only in that way can the defendant be aware of all the evidence against him. And only in that way can he be assured of full opportunity to refute such evidence.

Thus a contempt defendant who is judged in whole or in part on the basis of a transcript of testimony introduced in some other proceeding or on the basis of the judge's memory of such testimony has not been accorded the basic rights which fairness and due process require. Such an intermingling of two separate proceedings deprives the defendant of the right to be confronted with and to cross-examine the witnesses whose testimony is being utilized to adjudge his contempt guilt. It deprives him of the right to a full and fair separate hearing on the contempt charges.

Leaving aside constitutional requirements, the basic elements of a full and fair hearing "include the right of each party to be apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence." *Carter v. Kubler*, 320 U.S. 243, 247. In the words of the court in *Powhatan Mining Co. v. Ickes*, 118 F. 2d 105, 109 (C.A. 6), "We are unable to see how there has been a full hearing unless the right to cross-examine has been afforded." The right to a hearing, in other words,

embraces not only the right to present evidence on one's behalf but also a reasonable opportunity to know the claims and the evidence of the prosecution and to meet them through the time-honored techniques of cross-examination and rebuttal. *Morgan v. United States*, 304 U.S. 1, 18. See also *Reilly v. Pincus*, 338 U.S. 269, 275; *Inland Steel Co. v. N.L.R.B.*, 109 F. 2d 9, 19-20 (C.A. 7); *Daily Review Corp. v. N.L.R.B.*, 192 F. 2d 269, 270 (C.A. 2).

This basic right to be confronted with and to cross-examine the witnesses against one has been recognized and applied in criminal contempt cases by this Court. Thus in *In re Oliver*, 333 U.S. 257, 273, where the accused had no opportunity to cross-examine adverse witnesses or to summon witnesses on his own behalf, this Court stated:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; and these rights include, as a minimum, *a right to examine the witnesses against him, to offer testimony, and to be represented by counsel*. (Emphasis added).

And see *In re Murchison*, 349 U.S. 133, 134.

b. The violations of Rule 42(b) that occurred.

Tested by the foregoing principles, the conviction of petitioner cannot stand as to any of the three specifications. The Government has conceded in its brief in opposition to the grant of certiorari (p. 15) that "there may well have been a violation of the rule of confrontation" with respect to the first specification of contempt, the allegedly false and evasive testimony.

That much is admittedly true. And it is equally undeniable that as to all three specifications the trial was not conducted as an independent and separate criminal proceeding. Petitioner's conviction on all three specifications was premised exclusively on prior testimony and events not introduced or referred to at the contempt hearing and not subject to cross-examination at the contempt hearing by counsel for the petitioner. Due process in its most elemental form was denied petitioner.

The fact that petitioner's alleged contempt grew out of the prior Christianson-Paster criminal proceedings obviously made pertinent portions of those proceedings relevant to the contempt trial. Such items as the Christianson-Paster indictment, the impounding order, the order delaying the trial and petitioner's testimony under oath were all relevant and could have been introduced at the contempt hearing, though only as secondary evidence of the truth or falsity of his testimony. The trial judge said as much when he remarked that (R. 60), "it seems to me that in this [contempt] proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt proceeding arose out of the respondent's actions in the case of *United States v. Christianson, et al.*"

But the relevance of the prior proceedings did not obviate the necessity, under Rule 42(b), of treating the contempt trial as an independent proceeding and introducing at that trial all the evidence against the petitioner in a form that would permit him to exercise his right of cross-examination and rebuttal. The Government's burden of proving petitioner's guilt as to all

three specifications beyond reasonable doubt was not satisfied either by relying upon the judge's personal knowledge of preceding events or by merely introducing transcripts of testimony by witnesses in the prior criminal trial. If the contempt hearing was to satisfy the requirement that it be a separate entity, from the standpoint of procedure and proof, it was incumbent upon the Government to prove all the incidents of the alleged contempt by proper proof at the contempt trial. Only in that way could petitioner's right to be confronted with and to cross-examine adverse witnesses and to rebut all such evidence have any real meaning.

Yet it is obvious that no serious attempt was made at the contempt trial to prove petitioner's guilt in a manner consistent with the due process requirements of Rule 42(b). The record made before the District Court at the contempt hearing consisted solely of the following elements:

1. The order to show cause (R. 2-4).
2. The transcript of petitioner's allegedly false and evasive testimony given on April 1, 1954 (R. 5-24).
3. The two subpoenas which petitioner allegedly disobeyed (R. 24-28).
4. The direct examination and cross-examination of petitioner at the contempt trial (R. 38-67). During the course of petitioner's direct examination, fifteen documents were introduced into the record (R. 59), eleven of them having been surrendered by petitioner on or about April 1 and the other four being documents that were seized under the impounding order.
5. The transcript of the testimony of Richard N. Peterson, an F. B. I. agent, on April 12, 1954, during

the course of the Christianson-Paster criminal trial (R. 68-100).

Thus no independent proof was offered by the Government that the petitioner was guilty of any of the three specifications of contempt. Nothing more was introduced by the Government than the transcript of the Peterson testimony, apparently in an effort to prove the falsity and evasiveness of petitioner's April 1 testimony. But this transcript was offered with no suggestion or demonstration that Peterson was for any reason unavailable as a live-witness at the contempt hearing. Whatever relevance Peterson's testimony may have had did not eliminate the necessity of producing Peterson in person as a witness and permitting him to be cross-examined by petitioner's counsel. See *Motes v. United States*, 178 U.S. 458, 474.

The Court of Appeals sought to excuse the failure to produce Peterson by relying upon the fact that petitioner was an attorney of record for the defendant Paster at an early motion stage of the Christianson-Paster conspiracy proceeding. The court sought to impart significance to that fact by stating that, while petitioner did not participate in the conspiracy trial and did not sit at the counsel table, there was no reason why he could not have done so had he desired; thus he could have cross-examined Peterson at the conspiracy trial as Paster's attorney and accomplished as much as by cross-examining him at the contempt hearing. Moreover, said the court, petitioner could have called Peterson at the contempt hearing, along with the records, for the purpose of showing any inaccuracies in Peterson's summarization of them. S.R. 78, 227 F. 2d, at 78. Thus by a curious perversion of the rule that a transcript of former testimony is inad-

missible in the absence of affirmative proof that the witness is dead or unavailable, the court held that the apparent availability of Peterson to petitioner made his prior testimony admissible.

But as the Government has candidly conceded in its brief opposing the grant of certiorari (pp. 15-16), the violation of the rule requiring confrontation "was not cured by the fact that petitioner was attorney of record at the Christianson retrial, since he presumably would not there have been able to cross-examine as to matters not relevant to the issues at that trial and at a time when these contempt proceedings had not been initiated." Indeed, petitioner did not know and could not have known at the time of Peterson's testimony that it would later be used as proof of the contempt. The order to show cause why he should not be held in contempt was not issued until eleven days after Peterson testified. And it was not until near the end of the contempt hearing (R. 59) that the Government gave any notice that it intended to introduce or rely upon Peterson's testimony.

Even if petitioner had known definitely that contempt proceedings would later be brought against him and had been perceptive enough to anticipate that Peterson's testimony would be introduced as proof of his contempt, petitioner could not have cross-examined Peterson during the course of the criminal trial. Any cross-examination of Peterson at that point would have been ruled out as irrelevant to the conspiracy trial. As the trial court later stated (S.R. 48), the court during that trial was anxious not to permit the jury to learn of the impending contempt matter so that the conspiracy defendants would not be prejudiced thereby. And certainly it was not petitioner's

burden at the contempt trial to call for cross-examination any or all witnesses who had previously testified in the independent criminal proceeding and whose testimony might or might not be considered relevant in determining guilt on the contempt charges.

Petitioner, in short, had the right under Rule 42(b) to be confronted by Peterson at the contempt hearing and to cross-examine him there. And in the words of the court in *Matusow v. United States*, 229 F. 2d 335, 347 (C.A. 5), petitioner was entitled to have Peterson's testimony "given in a plenary proceeding at which his attorney had the right of cross-examination." Or, as stated by this Court in *In re Oliver*, 333 U.S. 257, 272, petitioner was entitled at the contempt hearing "to examine the witnesses against him, to offer testimony, and *to be represented by counsel*." (Emphasis added). Thus, despite the fact that petitioner himself was an attorney, he had the right to have counsel of his own choosing for purposes of the contempt proceeding. The right of cross-examination is normally exercised by one's counsel. And exercising that right through counsel is appropriate here only in the independent contempt proceeding. To attempt to exercise it through counsel in a separate and disconnected criminal trial would be both futile and chaotic.

But the violation of petitioner's due process rights under Rule 42(b) was not limited to the matter of the Peterson testimony. Nor was it confined to the first specification of contempt. The basic failure to keep the contempt hearing separate from the preceding conspiracy trial, the failure of the Government to confront the petitioner with all the elements of proof bearing upon his guilt, and the absence of an oppor-

tunity for petitioner to rebut and cross-examine the evidence and testimony against him were likewise applicable to the second and third specifications of contempt.

The Government, of course, had the burden of proving beyond a reasonable doubt that petitioner disobeyed the two subpoenas, as charged in the second and third specifications. To sustain that burden, the Government was obliged to establish independently the basic elements of such disobedience. And before the burden of proof shifted to petitioner, it was necessary that the Government "shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression". *Morrison v. California*, 291 U.S. 82, 88, quoted in *United States v. Fleischman*, 339 U.S. 349, 361. In other words, "before the burden of proof may be shifted, the Government's case must be independently established to some extent, and there must be a 'manifest disparity in convenience of proof and opportunity for knowledge'." *United States v. Patterson* 219 F. 2d 659, 662 (C.A. 2).

But in this case, the record established at the contempt hearing is devoid of independent proof by the Government of the elements of contempt set forth in the second and third specifications. Petitioner was confronted with no proof of his guilt and he was given no opportunity to rebut or explain such proof. The burden of proof never in fact shifted to petitioner.

Thus the Government made no effort to introduce into the record any of the various documents referred to in the two specifications of disobedience. It offered no proof to establish that these documents were required to be produced pursuant to the two subpoenas. No independent proof was given as to the time when or the circumstances under which these specified documents were seized by the Government so as to establish that they were readily accessible to petitioner. Nor was any reference, let alone proof, made at the hearing as to the court order of March 29, 1954, which the third specification charged him with violating. And as to the records mentioned in the second specification, the Government has now conceded (Brief in opposition to the grant of certiorari, p. 17, n. 7) that "There was no proof that these particular records were actually in existence at the time the subpoena was served."

It was not enough, moreover, that the books and records referred to by specification No. 3 purportedly were on a table in the presence of the court during the pendency of the contempt hearing. The physical presence of such documents and the court's personal assumptions or views as to their existence and the circumstances of their seizure were no substitute for independent formal proof of their existence, their relevance and their accessibility to petitioner. Nor could petitioner's admission that he had not produced these documents pursuant to the subpoena (R. 42-43, 46-54) or his introduction into the record of certain of these documents (R. 59) cancel the Government's burden of offering and confronting petitioner with independent proof of his disobedience.

Petitioner had a right under Rule 42(b) to know precisely how these documents were being used to

demonstrate his guilt under the third specification. That knowledge was essential so that he could have an opportunity to refute and rebut the implications of guilt. And that knowledge could come about only if the Government formally introduced independent proof relating to those documents. The Government's failure to follow such time-honored procedure and its reliance on the trial judge's personal knowledge effectively deprived petitioner of an opportunity to present an effective defense.

The defective procedure followed at the contempt hearing was highlighted by what transpired subsequently in the Court of Appeals. Clearly recognizing the deficiencies in the record compiled at the contempt hearing, the Government prepared and submitted to the Court of Appeals a supplementary record containing many matters which had not been introduced at the contempt trial. This was an obvious acknowledgement that petitioner's contempt conviction could not be sustained by reliance only on the formal record made at the contempt proceeding.

In sustaining petitioner's conviction, the Court of Appeals relied heavily on evidence and testimony with which petitioner had not been confronted at the contempt hearing. Thus in its affirmance of petitioner's guilt as to the first specification of false and evasive testimony, the Court of Appeals referred only to testimony given in the prior conspiracy trial. "It was the evidence adduced at the *Christianson* trial," said the court, "particularly that of Agent Peterson, which showed that Nilva's testimony was false." S.R. 77-78, 227 F. 2d at 78. And as evidence of the willfulness of petitioner's testimony and his knowledge of Mayflower's records, the court pointed to the testimony of

one James Christensen in the prior conspiracy trial. S.R. 76, 227 F. 2d at 77.

The Peterson testimony, as has been shown, was received over petitioner's objection at the contempt trial in the form of a transcript without any opportunity on petitioner's part to cross-examine Peterson. And the Christensen testimony was not even referred to during the course of the contempt hearing. That testimony is found only in the supplementary record (S.R. 36-37) and was one of the items which the Government included as an afterthought when the case was on appeal.

Moreover, the Court of Appeals sustained the conviction as to the second and third specifications with the remark that "His failure to produce records called for by the subpoenas was demonstrated by their subsequent production under the impounding order." S.R. 80, 227 F. 2d at 79-80. Such a remark could have been made only by reference to the supplementary record, for there was no demonstration in the record compiled at the contempt hearing that the records were produced under the impounding order. Indeed, this remark is totally incorrect as to the records specified in the second specification. The Government has conceded—again by reference to the supplementary record—that there was no proof that these particular documents were in existence at the time the subpoena was served or at the time of trial. And there was no proof even in the supplementary record that these items mentioned in the second specification had been seized under the impounding order.

The entire contempt proceeding was thus infected with due process violations. The petitioner was not confronted with the witnesses against him nor afforded

the opportunity of cross-examination. The Government's case rested not on evidence introduced at the contempt hearing but largely on the trial judge's personal views as to the events preceding the contempt hearing. The trial court made no effort to insist that the contempt proceeding be plenary in nature and one in which the Government had the burden of proving by independent evidence that petitioner was guilty of contempt beyond a reasonable doubt. These serious deficiencies were compounded by the action of the Court of Appeals in sustaining the conviction by reference to evidence that was either not produced in any form at the contempt hearing or that was produced in a manner which deprived petitioner of the right to have it produced "in a plenary proceeding at which his attorney had the right of cross-examination." *Matusow v. United States*, 229 F. 2d 335, 347 (C.A. 5).

Such gross violations of petitioner's rights under Rule 42(b) call for an unqualified reversal of the judgment below. Only in that way can petitioner be vindicated for the loss of an opportunity to be heard in his defense and to examine the witnesses against him—the loss of his right, in short, to his day in court. *In re Oliver*, 333 U.S. 257, 272.

2. RULE 42(a) WAS INAPPLICABLE TO THIS PROCEEDING AND COULD NOT OPERATE TO DIMINISH THE RIGHTS ACCRUING UNDER RULE 42(b).

Despite the fact that the contempt proceeding against petitioner was premised in the trial court exclusively on Rule 42(b) of the Federal Criminal Rules, the Court of Appeals stated in its opinion denying the petition for rehearing (S.R. 99, 228 F. 2d at 135) that the trial court "could, we think, properly have proceeded summarily against Nilva for contempt under

Rule 42(a) of the Federal Rules of Criminal Procedure." The fact that the District Court chose to proceed under Rule 42(b), said the Court of Appeals, did not place petitioner in any stronger position with respect to the admission of evidence to substantiate the charge that his conduct constituted contempt than he would have been in had he been proceeded against under Rule 42(a), although it gave him a better opportunity to defend against the charge." S.R. 100, 228 F. 2d at 136. Hence he could not "complain that he was proceeded against under the more favorable rule."

In effect, the Court of Appeals held that since the petitioner might have been subjected to summary procedure under Rule 42(a), he was in no position to object to any procedural irregularities or deficiencies in the admission of evidence against him. The fact that he was subjected to a Rule 42(b) proceeding gave him no greater right to procedural due process as to the evidence against him than if he had been the subject of a Rule 42(a) proceeding. Rule 42(b), in other words, operated only to give him "more adequate opportunity to produce evidence in explanation, exculpation or mitigation of his conduct."

This holding in the opinion on rehearing was more than mere dictum. It was the *ratio decidendi* underlying the court's entire approach to petitioner's due process rights under Rule 42(b). It serves to explain the summary rejection given in the court's original

⁷ The District Court was also of the same view. Thus, in the contempt proceeding, the trial judge stated (R. 30): "I think in this instance the Court could have, if it desired, proceeded under paragraph (a) of Rule 42 summarily without giving any time at all." But the judge did not certify, as required by Rule 42(a), that he saw or heard the conduct constituting the contempt and that it was committed in his actual presence.

opinion to many of petitioner's claims that the procedural requirements of Rule 42(b) had not been followed and that he had been denied a fair trial. See S.R. 80-81, 227 F. 2d at 79-80. It also demonstrates why the Court of Appeals failed to recognize that the introduction of the Peterson testimony in the form of a transcript presented a serious question.

The court's belief that Rule 42(b), in a situation where Rule 42(a) is thought to be applicable, has no due process impact on the prosecution of a contempt was premised on the assumption that the conduct of petitioner found to have been contumacious and obstructive was committed wholly within the presence of the trial judge. "It was the conduct of Nilva which occurred in the presence of the District Court and the evidence introduced relative thereto during the trial of Christianson and Paster," said the Court of Appeals, "which resulted in the subsequent contempt proceeding against Nilva." S.R. 99, 228 F. 2d at 135.

The assumption that Rule 42(b) was applicable to this case has no merit in law or fact. Even the Government now concedes (Brief in opposition to grant of certiorari, p. 16) that it is "very doubtful that the contempts charged here could have been dealt with summarily under Rule 42(a)." Rule 42(a) is concerned only with matters of decorum and conduct occurring wholly within the courtroom or in the immediate vicinity of the court. It contemplates only "that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial." *Sacher v. United States*, 343 U.S. 1, 9. And those occasions are limited to those involving "misbehavior in the vicinity of the court disrupting to quiet and order or actually

interrupting the court in the conduct of its business." *Nye v. United States*, 313 U.S. 33, 52. See also *Cooke v. United States*, 267 U.S. 517, 539; *In re Oliver*, 333 U.S. 257, 274; *In re Michael*, 326 U.S. 224, 227; *In re Murchison*, 349 U.S. 133, 137; *Matusow v. United States*, 229 F. 2d 335, 340-341 (C.A. 5).

In this case, of course, none of the allegedly contumacious acts occurred in the presence of the trial judge in such a manner as to disrupt the decorum or order of the court. As to the first specification of giving false and evasive testimony, it was not enough that such testimony—as well as other testimony thought to demonstrate or bear upon the issues of falsity and evasiveness—was given before the trial judge. The facts which bore upon the contumacious nature of petitioner's testimony were all matters which occurred outside the presence of the trial court. Those facts related to the presence or absence of the records of the Mayflower Distributing Co. at its place of business in St. Paul, Minn., and the nature and good faith of petitioner's search of those records in St. Paul. These were matters which the trial judge could not certify as having been seen or heard by him or as having taken place in his actual presence, as required by Rule 42(a). See *Matusow v. United States*, 229 F. 2d 335, 340-341 (C.A. 5); *Bowles v. United States*, 44 F. 2d 115 (C.A. 4).

Nor could such a certification have been made as to the facts constituting the subject matter of the second and third specifications of contempt. The alleged failure to bring in certain records required by the two subpoenas related to action or inaction by the petitioner which did not occur within the immediate presence of the trial judge so as to violate the quiet

and order of any judicial proceeding.⁸ The summary processes of Rule 42(a) thus could not have been brought to bear upon the assertedly contumacious disobedience of the subpoenas.

The inapplicability of Rule 42(a) to this case is plain. But even if the summary procedure of that rule was applicable to these circumstances, the fact remains that the trial court did not invoke Rule 42(a) in prosecuting petitioner for contempt. Thus all the due process connotations of Rule 42(b) became available to petitioner. The requirements of all the due process rights expressed and implied in Rule 42(b) could not be diminished by the applicability of a summary procedure under Rule 42(a) which the trial court elected not to pursue.

In other words, Rule 42(b) does not suddenly lose any of its due process requirements merely because Rule 42(a) might have been but was not employed. To hold, as did the court below, that the uninvoked availability of Rule 42(a) means that a Rule 42(b) proceeding protects the defendant only in his right to present a full defense, while depriving him of all due process protections as to the evidence submitted against him, is both unwarranted and unfair. Rule 42(b) affords a full measure of due process that cannot be diluted in such a manner.

⁸ Indeed, 18 U.S.C. § 401 makes it plain that by definition the disobedience of a subpoena, which is punishable under clause (3) of that statute, is unrelated to "misbehavior of any person in its [the court's] presence or so near thereto as to obstruct the administration of justice," which is punishable under clause (1) of the statute.

3. THERE WAS A COMPLETE ABSENCE OF COMPETENT EVIDENCE TO SUSTAIN THE CONVICTION

a. First specification.

While the court below recognized that a contempt defendant can be found guilty only on proof beyond a reasonable doubt, the court failed to look for or to find the existence of any competent evidence from which it could be concluded beyond a reasonable doubt that petitioner had given false and evasive testimony as charged in the first specification. Indeed, not only was there an absence of such competent evidence but the record affirmatively shows petitioner's innocence.

The court below misconceived the nature of petitioner's testimony which it found to be false and evasive. And it was thereby led to misconceive the nature of the competent evidence which was necessary to sustain the Government's burden of proof. The court stated that petitioner had sworn that he made a diligent search of the Mayflower records and that "the records he produced were all of the records of purchases except the records which were on file in the United States Court of Appeals in the Minnesota case." S.R. 74; 227 F. 2d at 78. The court found, moreover, that justice was obstructed by petitioner's testimony "that the records he produced and those which were in the Court of Appeals were the only records in existence relating to the subject matter he was examined about." S.R. 80; 227 F. 2d at 79.

But as previously noted, *supra*, p. 7, petitioner never in fact testified that he had brought all the records except those on file in the appellate court. He stated merely that he had searched through thousands of records, with the aid of office employees, and had brought those which to the best of his knowledge and

ability were required and available. He readily admitted that he may not have examined certain records, a fact of particular relevance in light of his lack of knowledge of bookkeeping methods and of the contents of specific records. See R. 8-20.

Evidence that there were in fact records not on file in the appellate court and which were not produced by petitioner as required—assuming such evidence was actually introduced into the contempt record—was thus inadequate to prove the falsity or evasiveness of petitioner's testimony. The falsity of such testimony could only be shown by evidence that petitioner did not make a diligent search to the best of his ability and that the records which he admittedly did not bring were withheld in order to frustrate the orders of the court.

There was, however, no evidence whatever contradicting the testimony of petitioner. As petitioner reiterated at the contempt hearing (R. 54), "I produced such items as I could find and that I was told that the Government was interested in in connection with the main lawsuit." There is not one word of testimony by any witness in the conspiracy trial—even assuming such testimony to be admissible—which denies that petitioner made a diligent search within his capacities or that he intentionally held back any records he knew should have been produced. Indeed, the testimony of Peterson and the other conspiracy trial witnesses on which the court below relied was necessarily confined to the issues involved in that trial. Those witnesses were not concerned with or asked about the truth or falsity of petitioner's testimony, a matter which the trial judge said he wanted to keep from the jury.
S.R. 48.

Moreover, even if there had been sufficient evidence to demonstrate the falsity or evasiveness of the testimony petitioner actually gave on April 1, there was no proof that such testimony was so clearly obstructive of justice as to fall within the prohibited realm of contempt. The trial judge apparently felt (S.R. 49) that the essential ingredient of obstruction came "from the fact that it became necessary to expend time and expense to impound the records pursuant to the Court's order," which records were "necessary and vital to the trial of U.S. v. Christianson, et al." And the Court of Appeals likewise found obstruction in the fact that "his conduct did necessitate a delay in the Christianson case" and that the obstruction was overcome only "by the impounding of the records, their tedious and laborious examination and their transportation to the place of trial." S.R. 80; 227 F. 2d at 79.

But as the Government has virtually conceded in its brief in opposition to certiorari (pp. 16-17), such an obstruction was one that flowed from the non-production of the books and records called for by the subpoenas rather than from the testimony itself. Considered apart from the non-production, the allegedly false and evasive testimony did not possess the critical element of "obstruction to the court in the performance of its duty," *Ex parte Hudgings*, 249 U.S. 378, 383. The judicial processes were not impeded or halted by the testimony as such. In fact, the testimony convinced the trial judge that an impounding order should be entered forthwith and the entry of that order and its execution constituted unimpeded judicial procedures.

Whatever labor or expense was involved in the examination of the impounded records and whatever delay was necessitated in the Christianson-Paster trial were

the direct consequences of the failure to produce the records pursuant to the two subpoenas. Even had petitioner never testified or had the trial judge been convinced that petitioner had given truthful testimony, the impounding order, with the ensuing labor, expense and delay, would presumably have been necessary if the records so impounded were to be made available. And even had petitioner admitted that he had disobeyed the subpoenas, the same impounding would have been necessary. Hence the testimony itself can retain at most the mark of perjury, a mark which was evident to the trial judge only after the records were impounded and Peterson testified as to their contents. See S.R. 48. There was no clear showing of any obstruction beyond that which adheres to any perjured relevant testimony.

As this Court has consistently held, "in order to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty." *Ex parte Hudgings*, 249 U.S. 378, 383. See *In re Michael*, 326 U.S. 224, 227-229. In this case there was lacking clear proof not only of perjury but of any obstruction to justice that resulted from the questioned testimony. Quite clearly, then, petitioner's conviction under the first specification of contempt cannot stand.

b. Second specification.

There was an obvious and admitted lack of evidence to sustain the conviction on the second specification, the alleged disobedience of subpoena No. 78 in not producing five specific items. "There was no proof that these particular records were actually in existence at

the time the subpoena was served." Brief of the Government in opposition to certiorari, p. 17, n. 7. Nor was there any proof that these five items were actually required to be produced under the terms of subpoena No. 78.

The fact that the Government's concession in this respect grows out of testimony "which was not introduced at the contempt hearing but which was referred to by the Court of Appeals" serves anew to emphasize the procedural inadequacies which marked the contempt hearing. At the hearing itself there was practically no mention, let alone proof, of the alleged disobedience of subpoena No. 78. The Government neither sustained its burden of proof nor confronted the petitioner with the evidence against him.

c. Third specification.

In its brief in opposition to certiorari, the Government sought to sustain the petitioner's conviction on the basis of the third specification alone, the specification that petitioner had disobeyed subpoena No. 160. It was said that the general sentence of a year and a day could be sustained "in view of the sufficiency of the proof and the propriety of the procedure as to specification No. 3" and hence "the main issues raised by the petitioner are not really in this case and need not be considered by the Court." Brief, p. 13.

But as was pointed out in petitioner's reply brief in response to the Government's brief, such a contention is without merit. The doctrine relied upon by the Government is to the effect that a general verdict or judgment in a criminal case on an indictment containing several counts cannot be reversed if any one of the counts is good and warrants the sentence im-

posed. *Claasen v. United States*, 142 U.S. 140, 146-147; *Pinkerton v. United States*, 328 U.S. 640, 641-642, n. 1; *Hirabayashi v. United States*, 320 U.S. 81, 85. But this doctrine, which stems from the presumption that the court awarded sentence on the good count only, is clearly inapplicable where, as here, the record demonstrates that the sentence was imposed without reference to any particular count or specification.

Petitioner here was found "guilty of criminal contempt as set forth in the Order to Show Cause insofar as the three specifications therein are concerned" (R. 67), and the sentence of imprisonment for a year and a day was imposed without reference to or without being broken down as to any particular specification (R. 67). Having found petitioner guilty of three separate acts of contempt, the court consolidated the sentence without indicating how much of the punishment was imposed for any particular contemptuous act. It thus cannot be presumed that the sentence was imposed solely on the basis of the third specification or that the first two specifications were ignored by the trial judge in imposing the sentence. But for the finding of guilt as to either or both of the other two specifications, the sentence imposed might have been less severe.

Under these circumstances, the judgment must be reversed if it appears that any one of the three counts is defective in law or in proof. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 440; *Stromberg v. California*, 283 U.S. 359, 368; *Williams v. North Carolina*, 317 U.S. 287, 291-292. Thus the third specification of contempt cannot be considered as the sole issue in the case as it reaches this Court. This case necessarily involves all three specifications and the various issues raised as to all of them.

But even considering the third specification by itself, the conviction based upon that specification cannot be sustained. As already indicated, the Government made no effort to prove that any of the records itemized in the specification were pertinent and within the plain reach of subpoena No. 160, or that the records were in existence and were readily accessible to petitioner at the time the subpoena was returnable. See *supra*, p. 32. Nor was there any proof that petitioner violated the court order of March 29, 1954, as found by the trial court (R. 66, insert page) in its judgment and commitment. Not the slightest attempt was made by the Government to introduce this court order or any of the specified items into the record of the contempt case. No attempt was made, in short, to present independent proof of the third specification of contempt or to confront petitioner with that proof so that he could rebut it. All was made to depend upon the judge's own recollection of events and upon his observation of records physically present before him on a table but not formally identified and introduced into the contempt hearing record. Obviously such a conviction cannot stand.

The Government, however, seeks to sustain the finding of guilt as to the third specification by reference to petitioner's admissions as to non-production and the asserted but unproved physical presence of the records before the court at the contempt hearing, thereby making out "a *prima facie* case of willful disobedience of the order of the court as to constitute contempt under 18 U.S.C. 401 and willful non-compliance with the subpoena under Rule 17(g) F.R.Cr.P." Brief in opposition to certiorari, p. 12. The contention is made that it then became petitioner's burden to go forward with his proof that his disobedience was with

"adequate excuse" and that such a burden was not discharged by his testimony that he could not find the records, that he did not think there were such records, and that he produced whatever he was able to find (R. 48-50, 52-54, 58). His failure to make a good faith search is said to be shown from the fact, as observed by the court below, that "practically all of the records called for by the subpoenas were later found when the records were impounded and examined." S.R. 80; 227 F. 2d at 80.

Apart from the fact that the Government did not make independent proof of petitioner's disobedience or introduce into the record any of the documents physically present before the court, it seems apparent that the petitioner by his unchallenged testimony did sustain his burden of going forward with proof that the non-production was with "adequate excuse". The unproved assertion that the records were later found when they were impounded does not necessarily demonstrate the absence of a good faith search by petitioner. Each case must be adjudicated on its own circumstances. And the circumstances revealed by this record do not negate the truth of petitioner's testimony.

The Government suggests that the standard of proof of an "adequate excuse" is proof of the non-existence or unavailability of the records demanded by the subpoena. A good faith search for records which are in fact in existence and available thus becomes a contradiction in terms. If records that are in existence and are available are not in fact produced, there can be no "adequate excuse" in terms of a good faith search. But there are several factors present in this case which make the application of such a rigid standard of proof both unreasonable and unrealistic:

(1) Subpoena No. 160, like subpoena No. 78, was not directed to the petitioner but to the Mayflower Distributing Co. R. 2, 3, 24, 26.

(2) These subpoenas were not served upon petitioner but upon Walter D. Johnson, the secretary-treasurer of the Mayflower Distributing Co. R. 25, 27-28. And petitioner understood that it was Johnson's duty to compile the records and comply with the subpoenas. R. 41. Petitioner attempted to find the records and to respond to the subpoenas only after having been requested to do so by Johnson. R. 41-42.

(3) These subpoenas called for the production of documents of the Mayflower Distributing Co. of which petitioner was not the custodian. Petitioner was, in the language of the trial court, but a "nominal vice president of the Mayflower Distributing Company." S.R. 48. As petitioner himself explained (R. 39), he was employed by Mayflower in a legal capacity and "handled minor legal matters, collection matters, contracts, leases, things of that nature." He was not an accountant. R. 43. His status as vice president was but a nominal one and he could in no sense be considered the custodian of the corporate records.

(4) There was clear evidence available that Herman Paster, the sole stockholder and president of the Mayflower Distributing Co., had not only direct but exclusive control and possession of the books, records and documents of that corporation. S.R. 24-25.

(5) The subpoenas were both in broad terms in the sense that they called for the exercise of judgment on the part of the person responding thereto as to which specific documents and papers had to be supplied. The subpoenas themselves did not itemize specific records

but merely called for general categories of documents, necessitating in many instances an intimate knowledge of the bookkeeping and accounting records of the corporation. See R. 24-27.

Under these circumstances, where there is no allegation, proof or finding that petitioner was the custodian or had control of the documents not produced, and where it appears that someone else was the sole custodian, it is fair to put on petitioner the burden of producing only what he in good faith was able to find. Especially is this true since the subpoenas were not directed to him personally and there was no order of the court directed to him personally. As noted in *Wilson v. United States*, 221 U.S. 361, 374, 376,

Where the documents of a corporation are sought, the practice has been to subpoena the officer who has them in his custody. But there would seem to be no reason why the subpoena duces tecum should not be directed to the corporation itself. Corporate existence implies amenability to legal process. . . . A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

See also *United States v. Fleischman*, 339 U.S. 349, 357-358.

The subpoenas here were directed to the Mayflower Distributing Co. and were thus, in the words of the *Wilson* case, commands only "to those who are officially responsible for the conduct of its affairs." Or, as

stated in 8 Wigmore on Evidence (3rd ed.), Sec. 3200, p. 120,

When the documents desired are those of a corporation, it would seem that the subpoena may be directed to the corporation, but its officer who is their custodian is the proper person to hold liable for non-production.

In other words, absolute liability for non-production of corporate records that are in fact in existence and available seems to be limited to those officers who are the custodians of the records and who are officially responsible for the conduct of the corporate affairs. Thus in the *Wilson* case, the subpoena was directed to the corporation and was served on and responded to by its president, who had possession and control of the records. In *Lapiparo v. United States*, 216 F. 2d 87 (C.A. 8), the defendant whose conviction for contempt for failure to produce corporate records was sustained was the president of the corporation, not a mere nominal officer, and was the owner of some 48% of its common stock. This relationship was held to justify the conclusion that he controlled the corporate records. And see *People v. Rezek*, 410 Ill. 618, 628-629, 103 N.E. 2d 172, 132, where the fact that the defendants were the responsible officers of the corporation was held to outlaw a denial of their knowledge of the whereabouts of the corporate records.

On the other hand, where the person responding to the subpoena has been shown not to be officially responsible for the custody or control of an organization's records, contempt liability for good faith non-production has not been imposed. In *United States v. Patterson*, 219 F. 2d 659 (C.A. 2), a conviction for contempt was reversed for want of proof that the docu-

ments not produced were within the power and control of the defendant. And in *Bank of Utica v. Hillard*, 5 Cow. 153, 158 (N.Y.), the court stated that,

The obligation of Colling [the bank clerk] to produce the [bank books] upon the "duces tecum" depends on the question whether they were in his possession and under his control. He was the mere clerk of the plaintiffs, and in that character had no such property in or possession of the books as imposed the obligation to bring them.

Here the petitioner was but the nominal vice-president of the Mayflower Distributing Co., an officer whose duties were almost exclusively legal in character. He could not properly be described as the official custodian of the corporate records nor as one who is officially responsible for the maintenance of the records. He was, in relation to the records, not unlike the bank clerk in *Bank of Utica v. Hillard, supra*, who was held not to have such property in or possession of the books as imposed on him an absolute obligation to bring all available records beyond what he in good faith could find.

It is true that petitioner appeared at the April 1 hearing "in answer to the subpoena that was issued by the Government to produce the records." R. 8. Such an appearance clearly subjected him to a duty to testify truthfully and to conduct himself in the presence of the court without contempt. But it could not make him other than a nominal officer who lacked custody over the corporate records. Nor could such an appearance convert the commands of the subpoenas directed to the corporation into commands directed to him personally. Under Rule 17(c) of the Federal Rules of Criminal Procedure, a subpoena is a com-

mand only "to the person to whom it is directed," a limitation on the substantive effect of the subpoena which cannot be changed by a voluntary appearance.

Significantly, the trial judge did not use the occasion of petitioner's voluntary appearance as a basis for ordering petitioner to produce the documents. Instead, the documents were ordered impounded. But there was no order directed at petitioner which he disobeyed and there is no charge that he interfered in any way with the execution of the impounding order.

Petitioner, in short, should not be held to be the insurer of obedience by the corporation of the subpoenas directed to the corporation and served upon its secretary-treasurer. It was for the corporation's failure to obey the subpoena served on the corporation that petitioner has been found guilty of contempt. Such a result is unconscionable where there is lacking any indication that petitioner is other than a nominal officer without custody or control over the corporate books. The standard of a voluntary attempt on his part to answer for the corporation should be his good faith within the scope of his knowledge of the corporate records and his ability to comprehend the technical details of those records. A good faith search on his part should constitute an "adequate excuse" within the meaning of Rule 17(g) of the Federal Rules of Criminal Procedure.

Here there was convincing and undenied testimony of petitioner's good faith attempts to find and to produce what he thought the broadly-worded subpoenas demanded. Some of the records he could not find were so "buried" in the basement that not even the federal agents could find them in executing the impounding order without the aid of the corporation's president,

who had knowledge and custody of the records (R. 49, 52).

This Court has said that when "a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena". *United States v. Bryan*, 339 U.S. 323, 332. There was far more than a modicum of good faith proved in this case, however. There was unchallenged testimony that petitioner did all he could within his limited knowledge of the corporate records to comply with the two broadly-worded subpoenas. His good faith efforts to comply should therefore be viewed as adequate refutations of the second and third specifications of contempt. And, conversely, the record is barren of proof beyond a reasonable doubt that petitioner wilfully disobeyed the two subpoenas.

4. OTHER ERRORS WARRANT REVERSAL OF THE JUDGMENT BELOW

a. The supplementary record.

The court below committed plain error in denying petitioner's motion to strike those portions of the supplementary record which had not been incorporated by reference or otherwise introduced into the record of the contempt case. S.R. 69-72. As stated in *United States ex rel. Collins v. Ashe*, 176 F. 2d 606, 607 (C.A. 3),

It is so well established as not to require discussion, however, that a district court of the United States must base its decision on evidence actually in the record of the case and that the appellate tribunal cannot base an adjudication on items of evidence informally offered in the trial

court and, though apparently read by it, not made a part of the record.

Moreover, the supplementary record not having been presented to the trial court for inclusion in the record, the Court of Appeals lacked authority to add it to the record and to consider it in reviewing the action of the trial court. *Heath v. Helmick*, 173 F.2d 156 (C.A. 9); *Washington v. United States*, 14 F.R.D. 221 D.C. Ky.).

b. Time for preparation.

The trial court erred in denying petitioner sufficient time in which to prepare his defense. Under Rule 42(b), one accused of criminal contempt is entitled to "a reasonable time for the preparation of the defense." While the reasonableness of the time allowed will vary from case to case, the facts here (see p. 11, *supra*) demonstrate that the four days allowed, including a weekend, to permit petitioner to secure counsel and to enable that counsel to familiarize himself with the case and prepare an adequate defense were entirely insufficient.

This case involved multitudinous documents and a careful study of petitioner's questioned testimony and the events relating thereto. The Government suggests (Brief in opposition to certiorari, pp. 13-14, n. 1) that there was adequate time to prepare a defense since the alleged contempt was committed on April 1, since he was put on notice "that his misconduct had been discovered" when the records he failed to produce were impounded, and since on April 15 he promised not to leave the court's jurisdiction without permission. Hence it is said that the four days between the issuance of the order to show cause on April 23 and the

hearing on April 27 were not unreasonably short under the circumstances.

But however many indications the trial judge may have given that he was going to charge petitioner with contempt, it was not until April 23 that the court gave actual notice of the contempt charges. It was not until then that petitioner could have known the precise nature of the charges and what documents he allegedly failed to produce. Prior to April 23, it would have been impossible for petitioner or his counsel to have begun meaningful preparations for defending charges which had not yet been specified.

Four days were all that were available. But due process under Rule 42(b) required that more than four days be allowed to answer so serious and complicated a set of charges as here involved. See *United States v. Aberbach*, 165 F.2d 713, 714 (C.A. 2), ten days held reasonable; *United States v. McGovern*, 60 F.2d 880, 882 (C.A. 2), six days given to answer.

c. The Peterson testimony.

The trial court erred in admitting and considering the transcript of testimony by Richard N. Peterson for the additional reason that such transcript, assuming it to be otherwise admissible in the trial proceeding, involved a mere summation and tabulation made from voluminous records seized from the Mayflower Distributing Co. Unless it could be shown—as it was not—that the original records were destroyed or were otherwise unavailable, the records themselves are the primary evidence of their own existence. Where, as in the contempt proceeding, the existence of the documents is a prime issue, testimony about the documents

is secondary and explanatory only. See 4 Wigmore on Evidence (3rd ed.), §§ 1192, 1244(4).

Most of the documents which petitioner failed to produce were assertedly on a table in the presence of the court during the contempt trial. But the Government made no effort to introduce any of them into the record, making the introduction of the Peterson transcript all the more inexcusable. Moreover, since the Peterson testimony was not introduced until near the end of the contempt hearing, petitioner had no adequate opportunity to check the voluminous documents against Peterson's testimony for inaccuracies and to call Peterson as a witness at the hearing. There had been no prior indication that Peterson's testimony was as all relevant or would be used to prove the existence of the records.

d. The scope of the subpoenas.

Subpoenas No. 78 and No. 160, in calling for the production of "all" records of shipments of "merchandise, parts or units of coin-operated amusement devices or gambling devices" (R. 27) or "all slot machines, flat-top or console, coin-operated device, whether new or used" (R. 25) between certain dates or pertaining to dealings with named individuals, were obviously not intended to produce only evidentiary materials but were "fishing expeditions" to see what might turn up. The Johnson Act, 15 U.S.C. § 1171, which was the basis of the Christianson-Paster criminal proceeding, deals only with "gambling devices" as therein defined and has no impact on "merchandise" or "coin-operated amusement devices" such as were mentioned in the subpoenas. The subpoenas thus called both for materials which the

Mayflower Distributing Co. was bound to produce and for materials which it was not bound to produce.

In *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221, this Court held that one should not be held in contempt for disobedience of one clause of a subpoena which called for the production of all documents "relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants." The fatal defect in this clause was that it was "not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up." The clause was therefore held invalid. This Court further added (p. 221):

One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad.

And so in this case, the two subpoenas indiscriminately called for the production of documents without regard to their evidentiary value or their pertinence under the Johnson Act. The burden was thrust upon the petitioner to cull the good from the bad and to risk a judgment as to whether any or all of the requested documents were evidentiary or pertinent materials. And there was no proof whatever at the contempt trial that any of the documents requested under the subpoenas and specified in the order to show cause were evidentiary in nature or were in any way relevant to the Christianson-Paster conspiracy trial. The *Bowman Dairy* case makes clear that petitioner cannot be held in contempt under such circumstances. The

ruling to the contrary by the court below was erroneous.

e. **The excessive sentence.**

The trial court plainly abused its discretion in sentencing petitioner to imprisonment for a year and a day. In view of the entire record and the nature of the offenses charged, the sentence was excessively severe.

Petitioner, as has been noted, was not the person to whom the subpoenas were directed. Despite the fact that he was but a nominal officer and was not the official custodian of the corporate records, he voluntarily appeared in response to the subpoenas addressed to the Mayflower Distributing Co. He made a good faith effort to comply with the subpoenas within the limited scope of his knowledge of the records. And upon him was put the burden of trying to understand and apply the broad language of the subpoenas, language that did not call for specific items and language which did not distinguish between the relevant and the non-relevant or the evidentiary and the non-evidentiary. He was forced to make his own judgments as to what the subpoenas meant and precisely what records were to be produced.

Yet there is no indication that petitioner failed to produce any document specifically requested, that he disobeyed any order directed to him personally, or that he failed to cooperate with the court when requested to do so. There is no possible ground for concluding that the petitioner deliberately and flagrantly violated the court's commands. His mistakes or failures occurred in good faith.

The sentence imposed upon petitioner was undoubtedly influenced by the trial court's feeling that peti-

tioner's record was not unblemished in that he had been a defendant in the first trial of the criminal conspiracy case. "Had he been a defendant in the case as it was tried this time," said the court, "I don't think he would have been so fortunate." S.R. 45. Sentence was imposed soon after this remark was made.

Under these circumstances—and particularly in view of the trial court's obvious feeling that petitioner would have been convicted and imprisoned had he not been acquitted at the first trial—the sentence of a year and a day was excessive. That excessiveness is not lessened by the fact that petitioner was an attorney. It was not in his status as an attorney, but rather in his actions as a nominal officer of a corporation, that he was charged with contempt of court. In no similar reported contempt case has such a long sentence been imposed or sustained. See *Sacher v. United States*, 343 U.S. 1 (six month's sentence); *Offutt v. United States*, 348 U.S. 11 (ten days' sentence reduced by Court of Appeals to forty-eight hours); and see *United States v. Patterson*, 219 F.2d 659, 660 (C.A.2).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed in its entirety.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 37

ALLEN I. NILVA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This reply brief is directed solely to the Government's contention in its brief (pp. 15-25) that petitioner was properly adjudged guilty of contempt for failure to produce the records referred to in the third specification.

It is said that the facts necessary to make out a *prima facie* case of such a contempt were established

by the record made at the contempt hearing. The erroneousness of this contention, however, is readily demonstrable from an examination of the record.

Subpoena duces tecum No. 160, which formed the basis for the third specification of contempt, called for the production of "all invoices, bills, checks, slips, papers, records, letters, ledger sheets, bookkeeping records, journals and copies thereof between, by or concerning Mayflower Distributing Company, made, entered, sent or received from July 1, 1950, through April 30, 1951, both dates inclusive, reflecting any and all purchases, sales, trades, exchanges or transfers, both domestic and foreign of any and all slot machines, flat-top or console, coin-operated device, whether new or used with any persons, firm or concern." (R. 24-25).

This was obviously not a precisely-worded subpoena, spelling out with particularity the items requested. It was a fishing expedition designed to produce whatever might turn up, from which evidentiary materials might subsequently be used. See *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221. Its broadness and lack of particularity are underscored by the precision which characterizes the third specification of contempt, a specification which itemizes twenty-two specific records which petitioner allegedly did not produce. (R. 3-4).

The important point here, however, is that the very broadness of the subpoena had a fatal impact upon the proof adduced by the Government at the contempt trial. Such a subpoena made it necessary not only that there be proof of the existence of pertinent documents unproduced by petitioner but also that there be proof that the documents mentioned in specification

No. 3 were within the scope and intendment of subpoena duces tecum No. 160. But quite plainly there was no such proof as would support petitioner's conviction under the third specification.

The Government relies upon the assertion (Brief, p. 17) that the existence of the records, enumerated in the third specification, "was shown by the fact that they were present in the courtroom when the contempt hearing commenced (R. 42, 58-59), and that four were formally introduced in evidence (R. 59)." But apart from three of the four records that were introduced by petitioner, there was no identification or proof that any of the other nineteen items mentioned in the third specification were on the counsel table or elsewhere in the courtroom. Nor was there any indication that any of the records on the table were records that petitioner had failed to produce under the subpoena or that lay within the scope of the subpoena. What was on the table had apparently been seized under the impounding order but nobody could or did say that the records required by subpoena duces tecum No. 160 were included therein. As stated by petitioner's counsel near the close of the contempt hearing (R. 58-59):

With respect to the rest of the exhibits here, I must respectfully tell the Court that I have not had time to make any examination of them but apparently they constitute a portion of the records which were impounded by order of this Court. That includes what else is on the table, Your Honor. I have likewise had no opportunity to examine the records which were introduced as evidence in the [criminal conspiracy] case, so I am unable to question this witness [petitioner] concerning them.

To say that the records present in the courtroom were the records enumerated in the third specification is thus to indulge in the sheerest speculation unsupported by any proof or admission. Whatever admissions petitioner made as to documents he did not produce had no reference to the existence of the pertinent documents or as to their relevance under the terms of subpoena duces tecum No. 160. Thus his admission (R. 42-43) that he had not brought any of the "rather formidable display of records" on the table in the courtroom could not serve to prove that the documents listed in the third specification were on the table or that such documents were otherwise in existence.

No effort was ever made by the Government to show that any of the twenty-two items enumerated in the third specification were in existence or that they had been seized under the impounding order. There was no proof as to the circumstances or nature of the seizure of these items, if indeed they were seized, so as to indicate that they were accessible to petitioner in the course of his search.

The undeniable fact that three of the items mentioned in the specification were introduced into the record through the petitioner does not serve to prove the Government's case. The first of these items was described in the third specification as "General ledger 1950" (R. 3). Such a ledger obviously was in existence. But further proof was required to show that it came within the broad terms of subpoena duces tecum No. 160, that it reflected transactions of new or used "slot machines, flat-top or console, coin operated device" between the dates of "July 1, 1950, through

April 30, 1951." As stated by petitioner's counsel (R. 32-33), "in order to determine whether that ledger is an item which is requested by this subpoena, the ledger will have to be searched to find out whether that general ledger comes within this category that I have just read." Conceivably the general ledger might not have referred to sales or purchases of slot machines or other coin-operated devices.

Certainly petitioner's testimony did not prove the pertinence of the 1950 ledger under the subpoena. All that the record shows is the following question and answer (R. 48):

Q. Now, do you know of your own knowledge whether Respondent's Exhibit No. 1 contains any records pertaining to new and used slot machines during the period—the end period is April 30th, the beginning period is July 1, 1950?

A. No, I do not, sir.

As to the second item mentioned in specification No. 3, described as "General Ledger 1951" (R. 3), the following testimony was given by petitioner (R. 46):

Q. Now, can you tell us at this time whether Respondent's Exhibit No. 2 contains any record pertaining to new and used slot machines covering the period of July 1, 1950, to April 30, 1951?

A. No, sir, I cannot tell you whether it does.

The third item referred to in the specification, described as "Journal 1950-1951" (R. 3), was the subject of the following testimony by petitioner (R. 47):

Q. Now, can you tell from an examination of Respondent's Exhibit 3 whether that contains any records pertaining to new or used slot machines during the period of July 1, 1950, to and including April 30, 1951?

Mr. Dibble: I object to it—

A. (Interrupting) No, I cannot, sir.

The Court: Wait just a minute.

Mr. Dibble: I object to the question as being without foundation. There hasn't been any testimony that he has examined that record.

Q. (By Mr. Graff): Have you examined Respondent's Exhibit 3?

A. Yes, sir, I have examined this record, as well as the others, and from my examination—no, let me say, I examined those other two records previously and was unable to find any evidence of slot machines—

The Court: You are being asked about Respondent's Exhibit 3, the one you have in your hands now, Mr. Nilva.

A. Let me just look at it. (Witness examines said exhibit.) This one I have not examined.

The Court: The objection is sustained.

Q. (By Mr. Graff): So you don't know whether that contains any records pertaining to new or used slot machines?

A. That is correct, sir.

The fourth item mentioned in the specification, the "Check Register 1950-1951" (R. 3), was not introduced through petitioner, though the check register for the period from February 1, 1952, to January 31, 1953, was introduced as his fourth exhibit. His testimony concerning that exhibit did not admit or reveal its relevance under subpoena duces tecum No. 160. He merely stated that he had not examined it prior to April 1, 1954 (R. 48).

The Government, of course, introduced no proof whatever in connection with these four items and petitioner's testimony was in all respects uncontradicted

and unchallenged. Hence there is no evidence in the record that these four items were within the scope of the subpoena or that they should have been produced pursuant to that subpoena. When coupled with the utter lack of any evidence as to the existence or relevances of the other nineteen items in the specification, this evidentiary void becomes decisive.

There was no basis for the trial judge, as the trier of facts, to conclude from the testimony as to these four items that the documents were relevant to the demands of the subpoena. Many thousands of documents had been seized by the Government under the impounding order (S. R. 34) and Government agents clearly had to use their discretion and judgment in determining what documents were in any way relevant. The twenty-two documents enumerated in the third specification represented someone's judgment as to what was required to be produced from the thousands of seized records. But such a judgment could not be accepted automatically by the District Court. Proof was required to demonstrate the accuracy of that judgment and to show that the documents did in fact relate to the subject matter of the subpoena. No such proof was forthcoming.

There was not even any reference at the contempt hearing, let alone proof, as to the court order of March 29, 1954, which the third specification also alleged had been disobeyed (R. 3) and which formed part of the basis of petitioner's conviction under that specification (insert page opposite R. 67). The contempt record is entirely devoid of any proof of what that order provided, to whom it was directed, and whether it spoke in terms of the subpoena or in more specific

language. The Government in its brief significantly makes no effort to explain this glaring omission of proof of a basic element of the third specification.

This absence of basic evidence is underscored by the further failure to disprove that petitioner—in the circumstances of this case—made a good faith effort to find the documents. The broadness of the subpoena, the fact that the subpoena was directed to the corporation rather than to petitioner, the nominal nature of petitioner's relationship to that corporation, petitioner's lack of custody and knowledge of the records, and the voluntariness of his appearance in answer to the subpoena, all made it appropriate to test the willfulness of the alleged disobedience and the existence of an "adequate excuse" by the standards of good faith. But before petitioner's testimony as to his good faith could be challenged or disproved, it was essential to show that the records for which he is to be held accountable were in existence and were required to be produced under the terms of the subpoena. Neither element was proved in this case beyond a reasonable doubt.

In the light of such a record, petitioner is entitled to a judgment of acquittal on the third specification of contempt. The Government has sought and failed to prove the essential ingredients of a criminal contempt under that specification. It did not even prove a *prima facie* case. A judgment of acquittal is thus mandatory.

It should also be noted that the procedural inequities which marked the efforts to prove the first specification also affected the proceedings with relation to the third specification. What the Government basically

relied upon in the contempt trial as to all three specifications was the judge's personal knowledge of events preceding that trial. No effort was made to comply with the requirement of Rule 42(b) that petitioner be confronted with the evidence against him as to the alleged contempts. No effort was made to produce and confront him with evidence of the existence of the twenty-two items mentioned in the third specification and of their relevance under subpoena duces tecum No. 160.

Nor can it be said that the introduction of Peterson's testimony—which the Government concedes was improper—had no relevance to the third specification. In seeking to introduce the transcript of that testimony, counsel for the Government asserted "that the records of which we are talking and of which Respondent's Exhibits 1, 2, 3 and 4 are a part are the same records that were brought into court and from which Mr. Peterson testified he received his information." (R. 59). In other words, the Government was apparently seeking to use the Peterson testimony partly to prove the nature of the documents mentioned in the third specification and their pertinence to subpoena duces tecum No. 160. As the Government now states (Brief p. 22, fn.), Peterson's testimony "was based upon summaries made from records which were either *in evidence or physically before the court.*" (Emphasis added.) And those summaries were obviously related to the substance or contents of the records.

The procedural error of introducing the supplementary record before the Court of Appeals also infected the third specification. The Government concedes (Brief, p. 24, fn. 7) that this record was used as to the

third specification "to bring before that court the formal matters, such as the April 15 hearing, which were matters of record known to all parties in the District Court." The fact that these formal matters may have been known to all parties does not excuse the failure properly to introduce such matters into the record before the District Court. Nor does that fact add to the power of the Court of Appeals to implement the record or consider matters not formally before the District Court. Moreover, since the counsel representing petitioner at the contempt hearing had no connection with the April 15 hearing, it cannot be assumed that the failure to introduce the transcript of that hearing at the contempt trial was non-prejudicial to petitioner.

The substantive and procedural defects as to the third specification of contempt are so clear as to warrant reversal of the conviction based on that specification and to order that a judgment of acquittal be entered. And since the Government does not "undertake to sustain the convictions on two of the specifications" (Brief, p. 26)—the first two—it becomes appropriate to reverse the entire conviction and to order a judgment of acquittal as to all three specifications of contempt.

For these reasons, as well as those set forth in petitioner's main brief, the judgment below should be reversed in its entirety.

Respectfully submitted,

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The Supreme Court of the United States

OCTOBER TERM, 1955

No. 702

ALLEN I. NILVA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 5-15) is reported at 227 F. 2d 74. Its opinion on petition for rehearing (Pet. App. 16a-18a) is not yet reported. A memorandum opinion of the District Court (Pet. App. 1a-4a) is reported at 228 F. 2d 134.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955, and a petition for rehearing was denied on December 21, 1955 (Pet. App. 16a-18a). On January 16, 1956, the time

for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 18, 1956. The petition for a writ of certiorari was filed on February 17, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The dispositive issue is whether there was sufficient competent evidence to sustain petitioner's conviction for criminal contempt, under Rule 42 (b) of the Federal Rules of Criminal Procedure, on the third of the three separate specifications on which he was found guilty.

STATUTE AND RULES INVOLVED

18 U. S. C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Pertinent Federal Rules of Criminal Procedure are as follows:

* * *

Rule 17. *Subpoena.*

(c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * *

(g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issues if it was issued by a commissioner.

Rule 42. *Criminal Contempt.*

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall

records would be produced, Paster's counsel stated that this would be done the following day [April 1] (R. 5).

On April 1, 1954, petitioner, who was an attorney and vice-president of Mayflower, voluntarily appeared in answer to the two subpoenas duces tecum and the order to produce forthwith, and testified that he had "brought all the records that [he] could that those subpoenaes [sic] asked for" (R. 8-9). In answer to the question as to whether Mayflower purchased used slot machines during January 1951, petitioner stated that those records were in the Court of Appeals for the Eighth Circuit at St. Paul, Minnesota, on a different pending appeal² (R. 9). Petitioner testified that he and a clerk examined thousands of invoices for the months from January through April, 1951, but were unable to find any for second-hand machines (R. 17-18). After the court was convinced by government counsel that all the required documents (other than the exhibits in the Court of Appeals) had not been produced, it ordered the United States Marshal to impound all the Mayflower records at its place of business in St. Paul (R. 20, 23; S. R. 27-28). On April 2, 1954, F. B. I. agents started an examination of the impounded records (R. 70). On April 8, the court granted

² This case was *Nilva v. United States*, 212 F. 2d 115 (C. A. 8), certiorari denied, 348 U. S. 825, involving a Nilva other than petitioner.

government counsel a recess of one day in the Christianson retrial in order to permit further examination of the voluminous, additional Mayflower records produced (S. R. 33-35).

The records produced by petitioner in response to the subpoenas are Respondent's Exhibits 5 through 15 in the contempt hearing (S. R. 54-58). They show only that Mayflower purchased 78 slot machines between September 20, 1950, and December 29, 1950 (Ex. 14; S. R. 57, 58), and sold at least 64 slot machines between November 16, 1950, and December 28, 1950 (Ex. 8, 14; S. R. 55, 57).

At the Christianson retrial, F. B. I. agent Peterson, testifying on April 12, 1954, from summaries he had made after the intensive examination of the impounded records (R. 68-71), stated that they showed the purchase of 16 slot machines during November, 1950, 94 during December, 1950, 81 during January, 1951, and 7 during February, 1951 (R. 73, 74, 87). As to sales, Peterson testified that the impounded records disclosed that Mayflower sold 17 slot machines during November, 1950, 278 during December, 1950, 526 during January, 1951; and one during February, 1951 (R. 88, 90). The former Mayflower bookkeeper, Christensen, testified at the Christianson retrial that Baeder's ledger sheet (Plaintiff's Ex. No. 52; S. R. 61) and Sande's ledger sheet (Plaintiff's Ex. No. 94; S. R. 65)

were not complete (S. R. 37). As to Ex. No. 94 (Sande's ledger sheet), he testified that under instructions from petitioner, prior to the first Christianson trial, he removed certain invoices and replaced them with slips of paper; that Ex. No. 52, prepared by him under instructions from petitioner, was not a true copy of Baeder's account because the invoice covered four slot machines purchased by Baeder which were not put on this account (S. R. 37). The slips of paper referred to were found among the records impounded by the marshal (S. R. 63, 68).

On April 15, 1954, petitioner was subpoenaed before the court and ordered not to leave without the court's permission. Petitioner replied, "I will be pleased to comply with the order of the Court" (S. R. 39). The court ordered petitioner to produce the records he had previously brought in answer to the subpoenas. Petitioner mentioned that, while he had asked the advice of an attorney in the proceeding, he was "not looking for any legal technicalities or to assert any" and that he did not need any lawyer to represent him. The court repeated the admonition against petitioner's leaving, and petitioner stated that he certainly would not leave without the court's permission. (S. R. 43-44.) The court impressed upon all parties that its order about an impending contempt proceeding against petitioner

* Baeder and Sande were purchasers of slot machines from Mayflower.

should not be mentioned, so that the jury might not know of it, or be influenced by it, while the Christianson retrial was still in progress (S. R. 44; R. 35).

On April 22, 1954, the jury found the defendants guilty in the Christianson retrial (S. R. 20). On April 23, the court issued an order (R. 24) upon petitioner, pursuant to Rule 42 (b), F. R. Crim. P. (*supra*, p. 4), to appear on April 27, and show cause why he should not be held in criminal contempt for obstructing the administration of justice by (1) false and evasive testimony on April 1, 1954, upon answering the subpoenas *ducés tecum*; (2) disobedience to subpoena No. 78 in not producing 5 specific items; (3) disobedience to subpoena No. 160 and to the court's order of March 29, 1954, directing Mayflower to produce forthwith 22 specific items.

On the morning of April 27, 1954, petitioner's counsel requested a bill of particulars and an extension of time (R. 28-33). The motion for a bill of particulars was denied, but the hearing was continued until 3:00 p. m. of that day (R. 36, 35). The court expressly ordered that petitioner's counsel should have access to all of the impounded Mayflower records (R. 35).

Upon resumption of the hearing at 3:00 p. m., at petitioner's request, the transcript of his testimony of April 1, 1954, a copy of which he admitted receiving on April 16, was made part of

the record, and so also were subpoenas No. 78 and No. 160 (R. 38, 37). Petitioner testified in his own behalf (R. 38, ff). As to specification No. 3, the books and records which had been obtained after impounding by the marshal, and which petitioner was charged with having failed to produce, were before the court (R. 42-43) and petitioner admitted that he had not brought them pursuant to the subpoena (R. 42-43, 46-54). When questioned about the 22 items mentioned in that specification (No. 3) he admitted that he had not examined more than half of them, his excuses ranging from "I couldn't find that" to "I don't think there were any" (R. 46-54).

Upon the Government's motion, the transcript of the testimony of F. B. I. agent Peterson in the Christianson retrial (R. 68-100) was admitted in evidence, over petitioner's objection that this was hearsay and that he was deprived of the opportunity of cross-examining Peterson (R. 59-61). This colloquy took place (R. 60, 61):

Mr. DIBBLE [Government Attorney]. I think that [the transcript of Peterson's testimony] was part of the record of this Court and it was made in the presence of the Court. It constitutes part of the record to establish the importance of the records that [petitioner] did not bring in.

The COURT. Well, that seems proper to the Court. In fact, it seems to me that in

* The five items listed under specification No. 2 were not produced at all.

this proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt proceeding arose out of [petitioner's] actions in the case of *United States v. Christianson, et al.*

* * * *

I think the record in this proceeding ought to disclose the fact that this [petitioner] was an attorney of record for the defendant Paster in the case we have just completed trying. The objection is overruled.

Petitioner then stated that, although he had been an attorney of record for Paster, he did not sit at the counsel table and took no part in the proceedings (R. 61-62).

At the conclusion of the hearing, the court found petitioner guilty of all three specifications in the contempt citation, and imposed a sentence of imprisonment for one year and one day (R. 67). On appeal, the Court of Appeals unanimously affirmed (Pet. App. 5a-18a).

ARGUMENT

1. Petitioner's general sentence for a year and a day may be sustained on the basis of specification No. 3 alone, the specification which charged him with having willfully disobeyed a subpoena and the order of the court for the production of certain records of the Mayflower Company (*supra*, p. 9). See *Hirabayashi v. United States*, 320

U. S. 81, 85; *Pinkerton v. United States*, 328 U. S. 640, 641-642, fn. 1.

The fact of non-production was not in dispute and proof of such fact did not depend upon the Peterson testimony at the Christianson retrial, the admissibility of which is the principal issue raised by the petition for certiorari (Pet. f2-16). Non-production was adequately shown by the transcript of petitioner's testimony at the April 1 hearing, as well as by petitioner's subsequent admissions at the contempt hearing (see *supra*, pp. 9-10). That the records were in existence at the time the subpoena was served, and the order issued, was proved by the fact that the records were actually before the court at the contempt hearing. This made out a *prima facie* case of willful disobedience of the order of the court so as to constitute contempt under 18 U. S. C. 401 and willful non-compliance with the subpoena under Rule 17 (g) F. R. Crim. P. *Patterson v. United States*, 219 F. 2d 659, 660 (C. A. 2); *Lopiparo v. United States*, 216 F. 2d 87, 91-92 (C. A. 8), certiorari denied, 348 U. S. 916.

It was then for petitioner to go forward with his proof that his disobedience was with "adequate excuse." See Rule 17 (g); *London Guarantee & Accident Co. v. Doyle & Doak*, 134 Fed. 125, 128 (C. C. E. D. Pa.). If he thought any information from Peterson would aid his position that the records were hard to find, it was his duty to adduce such testimony. For the prosecution's burden of

establishing non-compliance, the Peterson testimony added nothing to what the books and petitioner's admissions themselves showed.

Manifestly, petitioner could not absolve himself from the contempt charge merely by testifying that he could not find the records mentioned in the subpoenas, that he did not think there were such records, and that he produced whatever he was able to find (R. 48-50, 52-54, 58). The fact that he did not make a good faith search for the required records—regardless of his protestations of having done all he possibly could to comply with the subpoenas—is apparent from the fact, as observed by the court below (Pet. App. 14a), that "practically all of the records called for by the subpoenas were later found when the records were impounded and examined."

In view of the sufficiency of the proof and the propriety of the procedure as to specification No. 3,⁵ the main issues raised by the petitioner are not really in this case and need not be considered by the Court. Specification No. 3, alone, can support

⁵ There is a suggestion in the opinion of the Fifth Circuit in *Matusow v. United States* (No. 15527), decided January 27, 1956, relied on by petitioner, that under 18 U. S. C. 402, a defendant tried for contempt for disobedience of an order is entitled to a jury trial. The court failed to note that 18 U. S. C. 402 specifically provides that it does not apply to contempt for disobedience of orders entered in suits brought by the United States.

"Other points urged by petitioner which can be said to go to specification No. 3 are insubstantial (Pet. 24-26):

(1) Petitioner had sufficient time to prepare his defense,

the verdict, and since it seems evident that the sentence was basically for flouting of the court's order in failing to produce records which petitioner could readily have produced, there is no occasion to reach the more difficult questions petitioner raises as to specifications Nos. 1 and 2.

2. Petitioner's principal contentions relate to the proof on specification No. 1 that he gave false and evasive testimony. He argues that at the contempt hearing he was illegally deprived of the right to confrontation and cross-examination of FBI agent Peterson when only a transcript of petitioner's testimony was introduced to prove that he had testified falsely when he stated in effect that he had produced all the records called for in the subpoenas. He also argues that the courts below erred in upholding the procedure

in view of the fact that the contempt was committed on April 1; that he was put on notice that his misconduct had been discovered when the records he failed to produce were impounded on the next day; that on April 15 he promised the court he would not leave its jurisdiction; that the order to show cause why he should not be adjudged guilty of criminal contempt was issued on April 23; and that it was not until April 27 that the contempt hearing was held.

(2) The subpoena was limited in scope, and did not have a catch-all provision such as that in *Bowman Dairy Co. v. United States*, 341 U. S. 214, 221.

(3) Petitioner's sentence of one year and a day was imposed only after a very careful consideration of his offense as being aggravated by reason of the fact that he was an experienced attorney (Pet. App. 2a-4a), and the sentence was not an abuse of the court's discretion. Cf. *Hallinan v. United States*, 182 F. 2d 880, 887-888 (C. A. 9), certiorari denied, 341 U. S. 952; *Sacher v. United States*, 343 U. S. 1.

on the ground that he could have been summarily punished for contempt in the presence of the court, under Rule 42 (a). Although we believe that they need not be reached, we discuss these issues because of their prominence in the petition and in the opinion of the court below.

(a). Petitioner's testimony at the Christianson retrial was based upon summaries made from impounded Mayflower books and records. Before the contempt hearing, the court expressly ordered that petitioner's counsel should have access to all of the impounded Mayflower records (R. 35). Petitioner thus had an opportunity to check Peterson's testimony with the records for any inaccuracies, and could have subpoenaed Peterson as a witness at the contempt hearing if he had so desired. If this had been done and Peterson's testimony had disclosed discrepancies, the court undoubtedly would have permitted petitioner's counsel to ask Peterson leading questions as part of an effective right of cross-examination. Even now there is no contention that Peterson's testimony was inaccurate. Moreover, the Peterson testimony proved no more than did the books actually before the court, *i. e.*, that petitioner's testimony was false when he said that he could not find the records.

Nevertheless, Peterson did not appear at the contempt hearing and there may well have been a violation of the rule of confrontation which was not cured by the fact that petitioner was attorney

the verdict, and since it seems evident that the sentence was basically for flouting of the court's order in failing to produce records which petitioner could readily have produced, there is no occasion to reach the more difficult questions petitioner raises as to specifications Nos. 1 and 2.

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on the ground that he could have been summarily punished for contempt in the presence of the court, under Rule 42 (a). Although we believe that they need not be reached, we discuss these issues because of their prominence in the petition and in the opinion of the court below.

(a). Petitioner's testimony at the Christianson retrial was based upon summaries made from impounded Mayflower books and records. Before the contempt hearing, the court expressly ordered that petitioner's counsel should have access to all of the impounded Mayflower records (R. 35). Petitioner thus had an opportunity to check Peterson's testimony with the records for any inaccuracies, and could have subpoenaed Peterson as a witness at the contempt hearing if he had so desired. If this had been done and Peterson's testimony had disclosed discrepancies, the court undoubtedly would have permitted petitioner's counsel to ask Peterson leading questions as part of an effective right of cross-examination. Even now there is no contention that Peterson's testimony was inaccurate. Moreover, the Peterson testimony proved no more than did the books actually before the court, *i. e.*, that petitioner's testimony was false when he said that he could not find the records.

Nevertheless, Peterson did not appear at the contempt hearing and there may well have been a violation of the rule of confrontation which was not cured by the fact that petitioner was attorney

of record at the Christianson retrial, since he presumably would not there have been able to cross-examine as to matters not relevant to the issues at that trial and at a time when these contempt proceedings had not been initiated.

(b). The Court of Appeals' opinion on rehearing (Pet. App. 16a-17a) suggests that petitioner could have been punished summarily under Rule 42 (a), F. R. Crim. P., and therefore received more than his due when the trial court elected to proceed under Rule 42 (b). We are very doubtful that the contempts charged here could have been dealt with summarily under Rule 42 (a) (see *Nye v. United States*, 313 U. S. 33; *In re Oliver*, 333 U. S. 257; *In re Murchison*, 349 U. S. 133; *Matusow v. United States*, C. A. 5, No. 15527, decided January 27, 1956; cf. *Cammer v. United States*, No. 110, this Term, decided March 12, 1956), but the observation of the court below was no more than dictum since the District Court had deliberately proceeded under Rule 42 (b), and the Court of Appeals expressly held that, in its view, all rights available under the latter provision had been accorded petitioner (Pet. App. 17a).

(c) Perhaps a more difficult problem under the first specification, which is raised only inferentially in the petition, is whether the false testimony with respect to the books and records needed for the then pending trial was so clearly obstructive of justice, beyond that involved in perjury alone, as to differentiate this case from *In re*

Michael, 326 U. S. 224, and thus to render the false testimony a proper basis for contempt proceedings at all. Although there can be no question but that the non-compliance with the order and subpoena was a contempt, it is much more debatable whether the false and evasive testimony was, separate from the non-compliance, an independent basis for the contempt charged in specification No. 1. Cf. *Cammer v. United States*, No. 110, this Term, decided March 12, 1956.⁷

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is supported by the third specification, and the Court need not

⁷ Specification No. 2 was based on non-compliance with the subpoena in that certain records were never produced. There was no proof that these particular records were actually in existence at the time the subpoena was served. Normally, the government and the court would be justified in indulging in the presumption that records which a corporation would normally keep and which related to events not too far in the past were in existence and that, if they were not, it was up to the person subpoenaed to explain their non-production. *Lopiparo v. United States*, 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916; see also *Green v. United States*, 193 F. 2d 111 (C. A. 2). However, here the testimony of Mayflower's bookkeeper, which was not introduced at the contempt hearing but which was referred to by the Court of Appeals, tended to suggest that the records had been removed before the subpoena was served. Whatever obstruction might have been involved in that act, the testimony did tend to negative present existence of the records and therefore to raise a question as to the ability to comply with the subpoena. See *Patterson v. United States*, 219 F. 2d 659 (C. A. 2).

consider the other two specifications. The petition for a writ of certiorari should be denied.

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MARCH 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 37

ALLEN I. NILVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (S. R. 72-81) is reported at 227 F. 2d 74. Its opinion on petition for rehearing (S. R. 99-100) is reported at 228 F. 2d 134. A memorandum opinion of the District Court (S. R. 48-50) is reported at 228 F. 2d 134.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955 (S. R. 82) and a petition for rehearing was denied on December 21, 1955 (S. R. 100-101). On January 16, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 18,

1956 (R. 101-102). The petition for a writ of certiorari was filed February 17, 1956, and was granted April 2, 1956 (R. 102). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

1. Whether there was sufficient competent evidence to sustain petitioner's conviction for criminal contempt; under 18 U. S. C. 401 (3) and Rules 17 (g) and 42 (b) of the Federal Rules of Criminal Procedure, on Specification No. 3.
2. Whether the procedure by which petitioner was adjudged guilty of Specification No. 3 was proper.

STATUTE AND RULES INVOLVED

18 U. S. C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Pertinent Federal Rules of Criminal Procedure are as follows:

Rule 17. Subpoena.

* * * * *

(c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS. A subpoena may also command the person to whom it is directed to

produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

(g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issues if it was issued by a commissioner.

Rule 42. *Criminal Contempt.*

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The

notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involved disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

At a trial of petitioner, Christianson, and Paster in the United States District Court for North Dakota for conspiracy to violate the Federal Slot Machine Act (15 U. S. C. 1171-1177), petitioner was acquitted, but the jury disagreed as to the other two defendants. In preparation for the retrial of petitioner's two co-defendants (hereinafter called the Christianson retrial), the court issued subpoenas duces tecum directed to the Mayflower Distributing Company, a corporation wholly owned by Paster, to produce records of its sales of slot machines. Subpoena No. 78 called for production of records relating to transactions with several named persons from November 1950 to August 1951 (R. 26-27). Subpoena No. 160 called for production of various records including invoices, checks, letters, ledger sheets, bookkeeping records and journals, for the period from July 1, 1950 to

April 30, 1951, reflecting purchases, sales and transfers of slot machines and coin-operated devices (R. 24-25). The return date of both subpoenas was finally fixed at March 29, the date of the opening of the Christianson retrial. On that date, prior to the beginning of the Christianson retrial, Paster moved the court for an order quashing both subpoenas. This was denied. Pursuant to a government motion then orally made under Rule 17 (c), F. R. Crim. P. (*supra*, pp. 2-3), the court ordered that the books and records designated in the subpoenas be produced forthwith (S. R. 27-28).¹ Counsel for defendant Paster indicated that the order would be obeyed (S. R. 26). Several days later, when government counsel inquired as to when the records would be produced, Paster's counsel stated that this would be done the following day [April 1] (R. 5). Petitioner, an attorney, had entered an appearance as co-counsel for Paster (R. 61).

On April 1, 1954, petitioner, who was also vice-president of Mayflower, voluntarily appeared in answer to the two subpoenas duces tecum (Nos. 78 and 160) and the order to produce forthwith, and testified that he had "brought all the records that [he] could that those subpoenas [sic] asked for" (R. 8-9). (Certain records were produced (R. 54), inspected by the government, and turned back to the secretary of Mayflower (S. R. 42).) Asked whether Mayflower had purchased used slot machines during January 1951, petitioner stated that those records were in the Court

¹ References designated "S. R." are to the Supplemental Record filed in the Court of Appeals by the government.

already pointed out, however, this testimony is of no significance in relation to the charge of non-production of records, the existence of which was established by the introduction of the first four records in evidence and the presence of the other records in the courtroom. If petitioner had wished to show, in establishing his excuse for not producing the records, that they were difficult to locate and that the government had trouble in finding them, it was his duty, and not the government's, to call Agent Peterson. So far as the proof of the government's case is concerned, the testimony of Peterson added nothing to the proof of the only fact that had to be proved—that the records were in existence at the time the subpoena was served. The fact of existence was proved by the books themselves and was not disputed.

2. Petitioner also urges that he was not given sufficient time to prepare his reply to the order to show cause why he should not be adjudged guilty of contempt. The sole disputed issue before the court with respect to Specification No. 3 was whether or not petitioner had an adequate excuse for his known failure to produce the records called for by the subpoena. That he had ample time both to comply with the subpoena and to show his excuse for noncompliance is clear from the record. Subpoena No. 78 was served on the Mayflower

right of confrontation, it may be well to point out that the violation appears to have been more technical than real. The agent's testimony was based upon summaries made from the records which were either in evidence or physically before the court. Before the contempt hearing, the court ordered that petitioner's counsel have access to those records (R. 35). There never was, and still is, no contention that Agent Peterson's testimony was inaccurate.

Distributing Company on March 1, 1954, and originally made returnable March 22, 1954 (R. 26-28). Subpoena No. 160 was served on the company on March 25, 1954, and made returnable on March 29, 1954 (R. 24-25). By April 1, when the hearings were held in chambers, petitioner had had 31 days to comply with subpoena No. 78 and six days to comply with subpoena No. 160. Petitioner admitted seeing the latter subpoena shortly after it was served (R. 41, 63). By his own admissions he had spent only "several afternoons and a couple of evenings" trying to comply (R. 19). If he had found it impossible to comply with the subpoenas, he should have stated his reasons for noncompliance on April 1, 1954. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 551; *United States v. Bryan*, 339 U. S. 323, 333. Instead, petitioner asserted that he had complied as well as he could (R. 9).

On the twelfth day of the Christianson retrial, April 15, 1954, when the existence of the records called for in subpoena No. 160 was unmistakably known, the trial court met in chambers at the request of petitioner in the presence of defense and government counsel (S. R. 39-44). At that time the court ordered petitioner not to leave the jurisdiction of the court without the court's permission (S. R. 39). Government counsel then interrogated petitioner as to his testimony given in chambers on April 1, 1954, relative to compliance with the subpoenas (S. R. 39-40). Thus it was made apparent to petitioner on April 15, 1954, that the trial court intended, at the completion of the Christianson retrial, to take some action against him because of his noncompliance with the subpoenas (S.

R. 44).¹ He had already retained counsel to represent him in the matter of his compliance with the subpoenas (S. R. 43). Eight days later, on April 23, 1954, petitioner was served with the order to appear on April 27, 1954, and show cause why he should not be adjudged guilty of contempt (R. 2-4).

On the morning of April 27, 1954, when the contempt case was called, petitioner, through his counsel, objected that insufficient time had been allowed to prepare a defense and requested an extension (R. 33). The court granted petitioner until 3:00 p. m. of the same day to examine the impounded records which were in evidence in the court (R. 35). When the proceeding resumed at 8:00 p. m., petitioner testified that he had examined some of the impounded records and then identified them (R. 48, 46-57). It is thus clear that petitioner had ample notice that he was to be charged with willful failure to produce the records and ample time to prove an excuse, if he had such an excuse. Significantly, he failed to adduce the type of evidence which would substantiate his own testimony that he had made diligent search of the records with the aid of others; he called no witnesses to testify to his efforts in this regard. And, it should be noted, the availability of such proof would in no way be affected by examination of the contents of the records.

¹The only significance of the supplemental record before the Court of Appeals for the purpose of this specification (No. 3) was to bring before that court the formal matters, such as the April 15 hearing, which were matters of record known to all parties in the District Court. Petitioner's complaint that the Court of Appeals should not have considered the supplemental record (Br. 53-54) is therefore without merit insofar as it relates to specification No. 3.

From the day that petitioner testified on April 1, 1954, he was on notice that his production was not deemed compliance. From the time of the order to remain in the jurisdiction on April 15, 1954, he was on notice that proceedings would probably be instituted against him. He had notice of the formal charges from April 24 to 27. This procedure accords with the decision of this Court in *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 551, in which it stated:

* * * So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded. * * *

See also *Lopiparo v. United States*, 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916, where the defendant was instructed to produce records before a grand jury at 10:00 a. m. When he failed to produce the records at that time, asserting that he did not know where they were, the court immediately proceeded with a hearing and adjudged defendant guilty of contempt, sentencing him to 18 months' confinement. The Court of Appeals, in overruling the defendant's contention that he had not been accorded ample time to prepare his defense, pointed out that defendant "was advised from the beginning that he must produce the books or prove by convincing evidence his inability to produce them. * * *" (216 F. 2d at 92). Here petitioner had more than adequate notice of the charges and more than adequate time to prepare his excuses or defense.

II

PETITIONER IS NOT ENTITLED TO A NEW TRIAL ON HIS
CONVICTION FOR CONTEMPT

It is a general rule in criminal cases that, if a general sentence on several counts is within the limits that may be imposed on any one count, that count alone will support the verdict. On this basis petitioner's sentence may be supported on Specification No. 3, without reference to the other two specifications. *Pinkerton v. United States*, 328 U. S. 640, 641-642, fn. 1; *Abrams v. United States*, 250 U. S. 616, 619; *Powers v. United States*, 223 U. S. 303, 312; *Dunbar v. United States*, 156 U. S. 185, 192. We think that the rule is peculiarly appropriate in this case for it seems clear that the sentence was fixed at a year and one day, not because there were three specifications, but because of the general act of disobedience represented by the willful flouting of the subpoena with the evident purpose of affecting the evidence at the Christianson retrial. The refusal to place petitioner on probation was based by the District Court, not on the multiplicity of offenses, but on the fact that petitioner, as an attorney, undertook the type of action which "strikes at the very roots of our court system and damages the general repute of the legal profession" (S. R. 50). Under these circumstances, we see no occasion for remand of the case for resentencing.

However, since we do not undertake to sustain the convictions on two of the specifications, the Court may wish to remand the cause to the District Court for reconsideration of the sentence in the light of the

conviction on one specification alone. Our main position on this aspect of the case is that this would be the maximum relief to which petitioner would be entitled. He does not, as he claims, have a right to a retrial on his conviction under Specification No. 3.

Petitioner relies on dictum in *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, for his argument that, if his conviction on any count is found to be erroneous, the whole conviction should be set aside. The actual holding of that case was that the prison sentences could not be sustained because the defendants had been proceeded against by civil, rather than criminal, contempt. See 221 U. S. at pp. 451-452. In the course of the opinion, however, the court did say, as to the rule in criminal cases discussed above (221 U. S. at p. 440) :

That rule originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction.

But there is no room for such presumption here. The trial judge made no general finding that the defendants were guilty. But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts he consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the

defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that having found them guilty of these nine specific acts he did not impose some punishment for each. Instead, therefore, of affirming the judgment, if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

We question the validity of that dictum. The general rule in criminal cases has been applied to convictions by the court, acting as the trier of fact without a jury. *Whitfield v. Ohio*, 297 U. S. 431, 438; *United States v. Empire Packing Co.*, 174 F. 2d 16, 19 (C. A. 7), certiorari denied, 337 U. S. 959. It has been applied where a court has refused to set aside the verdict on counts ultimately held defective by the appellate court, so that it is impossible to rationalize the general rule on the presumption given in the *Gompers* case that the court rejected the bad counts. See *Pinkerton v. United States*, 328 U. S. 640, 641, where the Court of Appeals had held that a demurrer to certain counts had been improperly overruled by the District Court; see also *Haynes v. United States*, 101 Fed. 817 (C. A. 8). It seems that the true rationale is that, particularly where the counts are related, the presumption is that, with only one count before him, the judge would have imposed exactly the sentence which he did impose. Certainly that is a valid rationale in a case, such as this, where the

penalty is for one transaction even though many offenses may be involved.

In any event, all that the *Gompers* dictum states is that there must be a reversal of the judgment, with what further results it does not say. We submit that, even under the *Gompers* rationale, the reversal of the judgment would be for resentencing on the good count, and not for retrial on that count. Since the judge found petitioner guilty on all three specifications separately, there is no reason for a retrial on the third count where the conviction was properly obtained on sufficient evidence. The rule set forth by the Court in *Stromberg v. California*, 283 U. S. 359, 367-368, and *Williams v. North Carolina*, 317 U. S. 287, 291-292, is inapposite here. Those cases concerned a general verdict and not, as in this case, a general sentence. In neither of those cases was it possible to tell from the general verdict on which of several possible theories the jury relied. Since one of each set of theories involved in each case was fatally defective, a general verdict, which could have rested on the defective theory, was also defective, and the guilt of the defendant had to be retried. In the present case, however, petitioner was tried for contempt on three specifications, each involving a different theory, and separately found guilty on each. No sound purpose can be advanced for retrying petitioner on the good specification just because the other two theories are held defective. Any prejudice that may have accrued to petitioner from the finding on a defective specification can be corrected by remanding the case to the trial court for resentencing.

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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OCTOBER 1956.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1956

—
No. 37
—

ALLEN I. NILVA, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

—
PETITION FOR REHEARING
—

Petitioner prays that this Court grant rehearing of its order and opinion dated February 25, 1957, affirming his conviction for criminal contempt on specification No. 3, vacating the sentence and remanding the case to the District Court for reconsideration of the sentence.

of Appeals for the Eighth Circuit at St. Paul, Minnesota, on a different appeal (R. 9). Petitioner testified that he and a clerk had examined thousands of invoices for the months from January through April 1951, but were unable to find any for used machines (R. 17-20).

After the court was convinced that all the required documents (other than the exhibits in the Court of Appeals) had not been produced by petitioner, it ordered the United States Marshal to impound all the Mayflower records (R. 23). On April 2, 1954, F. B. I. agents started an examination of the impounded records (R. 70). Records impounded at Mayflower's place of business which dealt with purchases in late 1950 and 1951 were introduced in evidence at the Christianson retrial (R. 35), and on the basis thereof an F. B. I. agent testified to sales which were not reflected in the records produced by petitioner (R. 68-90).

On April 15, 1954 petitioner again appeared before the court in response to a new subpoena directed to him personally, and stated that the subpoena was unnecessary as he would have come voluntarily (S. R. 39). The court then ordered petitioner not to leave the jurisdiction of the court. Petitioner said, "I will be pleased to comply with the order of the Court" (S. R. 39). When government counsel asked petitioner to produce again the records which petitioner had previously produced under subpoenas Nos. 78 and 160 and which had been turned back to the secretary of Mayflower (*supra*, p. 5), petitioner stated that he did not know where the records were. The court then or-

dered him to produce them by 2:00 p. m. of the same day (S. R. 43). At the time, Paster's counsel stated that the attorney who was representing petitioner in this matter would like to examine the record if any proceedings were instituted against petitioner. Petitioner remarked that he was "not going to raise any technical objections" but wanted only "to cooperate with the Court" (S. R. 43). The court, after stating again that it ordered petitioner to remain in the jurisdiction and not leave without permission, cautioned everyone present at the hearing not to report the proceedings to anyone lest the jurors in the Christianson retrial learn of them and possibly be influenced (S. R. 44).

On April 22, 1954, the jury in the Christianson retrial found the defendants guilty (S. R. 20). On April 23, 1954, the court issued an order (R. 2-5) pursuant to Rule 42 (b), F. R. Crim. P. (*supra*, pp. 3-4), directing petitioner to appear on April 27, 1954, and show cause why he should not be held in criminal contempt for obstructing the administration of justice by (1) false and evasive testimony on April 1, 1954, upon answering the two subpoenas duces tecum directed to Mayflower (Nos. 78 and 160); (2) disobedience to subpoena No. 78 in not producing 5 specific items; (3) disobedience to subpoena No. 160 and to the court's order of March 29, 1954, in not producing 22 specific items. On the morning of April 27, 1954, petitioner's counsel requested a bill of particulars and an extension of time (R. 28-33). The motion for a bill of particulars was denied, but the hearing was continued until 3:00 p. m. of that day (R. 35-36).

The court expressly ordered that petitioner's counsel should have access to all of the impounded records (R. 35).

The hearing on the show cause order resumed at 3:00 p. m. on April 27. Petitioner's sole objection to proceeding at this time was that the court had denied his motion for a continuance to some further time and for a bill of particulars with respect to the first specification (R. 35, 36). At petitioner's request, the transcript of his testimony of April 1, 1954, a copy of which he had admitted receiving on April 16, 1954, was made part of the record, as were subpoenas Nos. 78 and 160 (R. 38). Petitioner testified in his own behalf (R. 38-66), and admitted seeing subpoena No. 160 shortly after it was served on the secretary of the Mayflower Distributing Company (R. 41; 63). Petitioner testified to having searched for records with a Clarence Wesley, a clerk in the office of the Mayflower Distributing Company (R. 43, 45), but Wesley was not called as a witness.

The books and records which had been impounded by the marshal, and which petitioner was charged in Specification No. 3 with having failed to produce under subpoena No. 160 (*supra*, p. 7), were before the court (R. 42-43), and petitioner admitted that he had not brought them pursuant to the subpoena (R. 42-43, 46-54). The first four of the 22 items set forth in Specification No. 3 were introduced in evidence at the hearing (R. 45-48, 59). These were the 1950 and 1951 general ledgers of various Paster enterprises, including the Mayflower Distributing Company, and the Mayflower journal covering the

1950-51 period. Petitioner admitted having previously examined the ledgers but claimed that he was unable to find any evidence of slot machines therein (R. 47). He testified that he did not know whether the 1950 ledger contained any records pertaining to new and used slot machines during the period July 1, 1950-April 30, 1951. (R. 46). In actual fact, this ledger reflected sales of new slot machines in the sum of \$13,281.00 during the period October 1950-January 1951 and sales of used slot machines in the sum of \$70,128.00 during the period July 1950-January 1951. Purchases of used slot machines, reflected in this same ledger, amounted to \$25,605 during the period August 1950-January 1951 (S. R. 51-52).²

When questioned about the remaining items enumerated in Specification No. 3, petitioner admitted that he had not examined more than half of them, his excuses ranging from "I couldn't find that" to "I don't think there were any" (R. 46-54). For example, although subpoena No. 160 (R. 24-25) specifically called for the production of "letters", petitioner testified that he did not check any correspondence files (R. 53). At one point, he stated (R. 53):

* * * I didn't check any correspondence files.
I did check the purchase files.

However, immediately thereafter when his attention was directed to the fact that failure to produce a

² Petitioner moved in the court below to strike certain portions of the Supplemental Record (S. R. 69-72), but no objection was made to S. R. 51-58, the list and description of exhibits.

purchase file was an item of Specification 3, petitioner claimed (R. 54) :

I didn't make any examination of the purchase file. I don't think we have any purchase file as such. I certainly couldn't find any.

Q. [Petitioner's counsel] In any event, you didn't examine it?

A. I didn't examine it. I couldn't find any.

After petitioner introduced in evidence those records which he had produced (R. 59), the transcript of the testimony of F. B. I. agent Peterson in the Christianson retrial (R. 68-100) was, upon the government's motion, admitted in evidence, over petitioner's objection that it was hearsay and that he was deprived of the opportunity of cross examining Peterson (R. 59-61). This colloquy took place (R. 60-61) :

Mr. DUBBLE [Government attorney]. I think that it [the transcript of Peterson's testimony] was part of the record of this Court and it was made in the presence of the Court. It constitutes part of the record to establish the importance of the records that Mr. Nilva [petitioner] did not bring in.

The COURT. Well, that seems proper to the Court. In fact, it seems to me that in this proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt proceeding arose out of the respondent's [petitioner's] actions in the case of *United States v. Christianson, et al.*

I think the record in this proceeding ought to disclose the fact that this respondent [petitioner] was an attorney of record for the defendant Paster in the case we have just completed trying.

The objection is overruled.

Petitioner then stated that, although he had been an attorney of record for Paster, he did not sit at the counsel table and took no part in the proceedings (R. 61-62).

At the conclusion of the hearing, the court found petitioner guilty of all three specifications in the contempt citation, and imposed a sentence of imprisonment for one year and one day (R. 67). On appeal, the Court of Appeals unanimously affirmed (S. R. 82).

SUMMARY OF ARGUMENT

Since petitioner's conviction for contempt can be sustained on the basis of Specification No. 3 which charged him with having willfully disobeyed subpoena No. 160 and the order of the court for the production of these Mayflower records, it is not necessary to consider his conviction on Specifications No. 1 and No. 2, which are of doubtful validity. His conviction on Specification No. 3 was supported by a sufficiency of proof and obtained with no defects in procedure.

I

A. Petitioner was properly adjudged guilty of contempt for failure to produce existing books and records of the Mayflower Company in response to subpoena No. 160. A prima facie case of contempt was established by showing both that the records called

for by the subpoena were not in fact produced and that such books and records, which were present in the court room during the contempt proceeding and four of which were formally introduced in evidence, were in existence when the subpoena was issued and served.

It was incumbent on petitioner, in the light of the *prima facie* case of contempt, to exonerate his non-compliance with the subpoena duces tecum by proving a legally sufficient excuse. Petitioner did not sustain his burden merely by stating that he could not find evidence of certain transactions in records he admittedly examined which clearly reflected those transactions, that he could not find the records, that he did not think there were such records, and that he produced such records as he was able to find.

B. The procedure by which petitioner was adjudged in contempt on Specification No. 3 accorded him due process of law. Such errors as may have arisen did not adversely affect his substantial rights or prejudice his cause on this charge of contempt. The transcript of testimony of an F. B. I. agent during the Christianson retrial, to which petitioner objects, was not relevant to Specification No. 3. It added little to the proof of the only essential facts, *viz.*, that the subpoenaed documents existed and that petitioner failed to produce them.

Petitioner was allowed sufficient time to prepare his reply to the order to show cause why he should not be adjudged in contempt for noncompliance with subpoena No. 160. The record reveals that he had ample time to comply with the subpoena or, in the alterna-

tive, to establish his legal excuse for noncompliance. Since on the return day of the subpoena, petitioner, rather than urging his excuse for not producing the documents, took the position that he had complied with its direction, he cannot now well claim he was not accorded sufficient time to establish an excuse. Furthermore, on April 15, 1954, petitioner was put on notice that he would be held to answer to contempt charges when the Christianson retrial ended. As the contempt case was not called for hearing until April 27, 1954, he had ample time to prepare his defense.

II

Petitioner is not entitled to a new trial on his conviction for contempt under Specification No. 3. Since the general sentence of one year and one day imposed on petitioner is within the limits of the penalty that may be imposed on each specification, it can be sustained if the conviction on Specification No. 3 is valid. The punishment imposed seems to have been for the one general act of disobedience to the subpoena, rather than for the multiplicity of specifications. However, since the government does not seek to sustain the convictions on Specifications No. 1 and No. 2, the Court may wish to remand the cause for reconsideration of the sentence in the light of the conviction on one specification alone. In that event, however, there is no necessity for a retrial on the third specification.

ARGUMENT

Petitioner's conviction for contempt may be sustained on the basis of Specification No. 3, which

charged him with having wilfully disobeyed subpoena No. 160 and the order of the court for the production of the Mayflower records.³ On this specification, as we develop more fully below in Point I, there was a

³ As set forth in the government's brief in opposition to certiorari, pp. 14-17, we have very grave doubts as to the validity of the conviction on the other two specifications.

Specification No. 2 relates to non-compliance with the subpoena covering invoices of sales to two individuals. At the Christianson retrial, the Mayflower bookkeeper had testified that, prior to the first trial, he had removed invoices as to these individuals and replaced them with slips of paper pursuant to instructions from petitioner (S. R. 37). The slips were found among the records impounded by the marshal (S. R. 63, 68). This testimony, which was not part of the contempt record, but which was referred to by the Court of Appeals, tended to negative the existence of the records at the time the subpoena was served. Under these circumstances, we do not support the conviction for disobedience of that subpoena. *Patterson v. United States*, 219 F. 2d 659 (C. A. 2). The government's own evidence rendered inapplicable the normal rule that a corporation will be presumed to have in its possession the type of records which it would ordinarily keep, and that it is the burden of the person subpoenaed to explain their non-production.

As to Specification No. 1, to the effect that petitioner gave false and evasive testimony on April 1, 1954, when he purported to comply with the subpoenas, there is a serious question as to whether the false testimony was so clearly obstructive of justice, beyond that involved in perjury alone, as to differentiate this case from *In re Michael*, 326 U. S. 224, and to render the false testimony, independent of non-compliance with the subpoena, a proper basis for contempt. We have not undertaken to resolve that issue for the reason that we also have serious doubts as to the procedure in relation to that specification. It seems that although, as discussed in the text (*infra*, pp. 15-21), the presence of the missing books in evidence and in court makes out a *prima facie* case of non-compliance with the subpoena, without the F. B. I. agent's testimony, the fact of the existence of the books without other explanation may not be enough to show that petitioner's testimony was false and evasive. Since the F. B. I. agent's testimony was introduced without his presence, there was a tech-

sufficiency of proof and no defect in procedure. There then remains only the question whether, on the one specification alone, the sentence may be sustained.

As we discuss in Point II, we think that the sentence was for the one general act of deliberate disobedience to the subpoena and that there is no occasion to remand the cause for reconsideration of sentencing, but, in any event, a remand for reconsideration of the sentence would be the maximum relief to which petitioner would be entitled.

I

PETITIONER WAS PROPERLY ADJUDGED GUILTY OF CONTEMPT FOR FAILURE TO PRODUCE BOOKS OF THE CORPORATION WHICH WERE CALLED FOR BY THE SUBPOENA

A. *A prima facie case of contempt was established by proof of non-production, plus proof that the records called for were in existence.*

The law of criminal contempt is clear that no individual may refuse to surrender existing documents of a corporation or association if they be within his nical violation of the rule of confrontation. This was not cured by the fact that petitioner was an attorney at the Christianson retrial since he would not there have been able to cross-examine as to matters not relevant to the issues at that trial and at a time when these contempt proceedings had not been initiated.

We cannot agree with the court below that the contempt was punishable as a summary one under Rule 42 (a) for it seems to us that, while petitioner's testimony on its face was unconvincing, the real proof of evasiveness stems from the subsequent evidence that the books were in existence and could, with genuine effort at compliance, have been found. Under these circumstances, the whole contempt on this charge was not committed in the presence of the court. See *Nye v. United States*, 313 U. S. 33; *In re Oliver*, 333 U. S. 257; *In re Murchison*, 349 U. S. 133.

control. *United States v. Fleischman*, 339 U. S. 349; *United States v. White*, 322 U. S. 694; *Wilson v. United States*, 221 U. S. 361; *United States v. Field*, 193 F. 2d 92 (C. A. 2), certiorari denied, 342 U. S. 894. A criminal contempt is committed when the witness fails to produce the corporate records called for by the subpoena at the time and place appointed. *Brown v. United States*, 276 U. S. 134; *United States v. Bryan*, 339 U. S. 323. As this Court stated in *United States v. Fleischman*, *supra*, at 365, "A subpoena is a sterile document if its orders may be flouted with impunity."

A prima facie case of criminal contempt, grounded on the failure of the defendant to produce documents in compliance with a valid subpoena, is made when the government shows that a valid subpoena duces tecum was served on the defendant requiring him to produce existing books and records within his control, and that he failed to do so. This Court said in *United States v. Bryan*, 339 U. S. 323, 330:

* * * But when the Government introduced evidence in this case that respondent had been

* Petitioner's attack upon the validity of subpoena No. 160 (Br. 56-58) is unfounded. Even a cursory reading of the subpoena reveals that it is neither unreasonable nor oppressive within the intendment of Rule 17 (c), F. R. Crim. P. It was directed to the Mayflower Distributing Company and required them to produce only specific books and records which are usually maintained in the normal course of business by a commercial enterprise. It was narrowly limited to those books and records kept during the 10-month period between July 1, 1950 and April 30, 1951, which reflected transactions in "slot machines, flat-top or console, coin operated device, whether new or used." Cf. *Wilson v. United States*, 221 U. S. 361, 376.

validly served with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in the subpoena she intentionally failed to comply, it made out a *prima facie* case of wilful default.

See also *Patterson v. United States*, 219 F. 2d 659, 660 (C. A. 2); *Lopiparo v. United States*, 216 F. 2d 87, 91-92 (C. A. 8), certiorari denied, 348 U. S. 916.

In the contempt proceedings against petitioner, the facts (which are largely undisputed) necessary to make out such a prime facie case were established. It was shown that subpoena No. 160 (the one involved in Specification 3) was served on the Mayflower Company (R. 24-25); that petitioner responded on behalf of the company (as its vice president) as the person who was complying with the subpoena (R. 8-9); and that he had not brought all the records called for in the subpoena. This last fact was not only admitted by petitioner at the contempt hearing (R. 42-43, 46-54), but had been previously established by petitioner's testimony on April 1, that he could not find the records (R. 15-16; *supra*, p. 6). The existence of the records, enumerated in Specification No. 3, was shown by the fact that they were present in the court room when the contempt hearing commenced (R. 42, 58-59), and that four were formally introduced in evidence (R. 59).

Thus, a complete case was established without any reliance upon the F. B. I. agent's testimony at the Christianson retrial. Any error in the manner by which such testimony was admitted (see *supra*, p. 14, fn. 3) is therefore immaterial in relation to this

specification. While the court was in error in relation to the other two specifications when it spoke of the burden being on petitioner (R. 29), it was not in any practical sense in error in relation to this specification for the basic facts of the government's *prima facie* case were not realistically in issue. They were not disputed.

When a *prima facie* case of contempt based on non-compliance with a *subpoéna duces tecum* has been established, it becomes incumbent on the defendant, if he would exonerate himself from guilt, to prove a legally sufficient excuse for his failure to produce the records. *Lopiparo v. United States*, 216 F. 2d 87, 92 (C. A. 8), certiorari denied, 348 U. S. 916, and the other cases cited *supra*, pp. 16-17. It works no injustice on a defendant to cast on him the burden of proving the negative averment that he could not find the documents called for by the subpoena. *Rossi v. United States*, 289 U. S. 89, 91-92; *United States v. Fleischman*, 339 U. S. 349, 360-361. It was this burden of excusing non-production that the court referred to in *London Guarantee & Accident Co., Ltd. v. Doyle & Doak*, 134 Fed. 125, 128 (C. C. E. D. Penn.), when it wrote:

It cannot be doubted, I think, that the burden of proof was upon them. The court's order

* For other instances in which the burden of proving facts peculiarly within his own knowledge is cast upon the defendant, see IX Wigmore, *Evidence*, 3rd Edition 1940, § 2486; cases collected in 56 A. L. R. 1273, 1274 (in bigamy prosecution, burden of proof of dissolution of first marriage rests with accused); 153 A. L. R. 1218, 1251 (defendant must prove he comes within exception to criminal statute where based on matters personal to him).

of June 25th necessarily implied that the books and papers were in existence, and within the defendants' reach. If they knew then that the facts were otherwise, it was their duty so to inform the court at once, and to object to the making of an order with which they must have known that they would not be able to comply. Failure thus to act at the proper time is properly followed by imposing upon them the burden of excusing their apparent disobedience to the order; and the same result follows, even if they were ignorant concerning the existence and whereabouts of the books, but did not take the trouble to ascertain in advance whether or not they could comply with such an order, and contented themselves with resisting the application upon other grounds. When a court requires the production of documents, it is presumed that these can be had; and, while the presumption is not conclusive, it has force enough to compel the party upon whom the order is made to undertake the task of showing to the court's satisfaction why the order cannot be fully complied with. If he leaves the matter in doubt or uncertainty, the presumption is not overcome, and the usual consequences of failure must be borne by the party who has failed to sustain the burden of proof.

A review of the record in this case makes it manifest that petitioner did not sustain his burden of proving his excuse for not producing the records. He could not absolve himself from the contempt charge merely by stating under oath that he had previously examined some of the records and could not find any evidence in them that was called for by the subpoenas,

or that he did not think there were such records, and that he produced whatever he was able to find (R. 48-50, 52-54, 58). As the court noted in *Lopiparo v. United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916:

The District Court did not believe and was not compelled to believe the testimony of the appellant that he was unable to find the books he was ordered to produce. The court was the judge of the appellant's credibility and the weight of his evidence. The appellant's self-interest was obvious. His defense was one easily fabricated and almost impossible to disprove.

The fact that petitioner did not make a good faith search for the required records—regardless of his protestations of having done all he possibly could to comply with the subpoenas—is apparent from the fact, as observed by the court below (S. R. 80), that "practically all of the records called for by the subpoenas were later found when the records were impounded and examined." Certainly, in the face of the fact that common books such as the 1950 and 1951 general ledgers and journal of the company were actually before the court and in evidence (R. 42-47, 59) and that the subpoena had called for these very books (R. 24-25), the court was justified in finding that petitioner's attempted explanation was less than "an adequate excuse" under Rule 17, F. R. Crim. P. for the admitted non-production. The *** * * prosecution need not negative every self-exculpatory suggestion of a recalcitrant witness *** * * * *United States v. Patterson*, 219 F. 2d 659, 662 (C. A. 2).

Petitioner also urges that the third specification was not proven because the subpoena was not directed to him but to the Mayflower Distributing Company, and was served on the secretary-treasurer of that company; that petitioner was not the custodian of the records of that company; and that Paster and not petitioner had exclusive control over the corporate records (Br. 48). But petitioner voluntarily appeared in answer to the subpoena and purported to comply with it (R. 8-9, S. R. 43), thereby waiving any objections on the grounds that the subpoena was not addressed to him. See *United States v. Bryan*, 339 U. S. 323, 333. Further, it was apparent that petitioner had access to the corporate records for he claimed to have searched through them (R. 16-18, 42). Indeed, he admitted that he had previously examined the very two records which are items (a) and (b) of Specification 3 (R. 47). The Government need not show that petitioner was the "authorized custodian" of the records but merely that "he had the demanded documents in his possession". *United States v. White*, 322 U. S. 694.

B. *The procedure by which petitioner was adjudged in contempt on Specification No. 3 fully accords with due process*

1. There were no errors in procedure which affect the conviction on Specification No. 3. Petitioner relies chiefly on the alleged violation of his right to confrontation in the introduction of the testimony of the F. B. I. agent on the Christianson retrial without calling the agent himself as a witness.⁹ As we have

⁹ While, as we have hitherto stated, we think that, if the testimony were of any significance, there was a violation of the

REASONS FOR GRANTING REHEARING

1. The majority of this Court has rested its affirmance of the conviction on the merest shred of evidence, evidence which was introduced as the consequence of an erroneous burden placed upon petitioner by the trial court. Confronted with an unprecedented record in which the prosecution had wholly failed to introduce even a shadow of a shred of competent evidence, this Court was forced to search for a basis for the conviction in the evidence introduced by petitioner. The majority believed that it found such evidence in petitioner's rather cryptic statement that he had "previously examined" two items which he introduced into the record. Without conceding that the inference drawn by the majority is supported by the evidence relied upon, it is earnestly submitted that this Court was in grievous error in assuming that petitioner's statement and the records introduced by him could properly be considered in weighing the sufficiency of the evidence below.

The Court wholly failed to note that petitioner's testimony and the documentary evidence were introduced only because the trial court erroneously placed upon him the burden to proceed (R. 29), notwithstanding the objections immediately raised by petitioner's counsel (R. 29). There can be no question of the trial court's error in forcing petitioner to proceed in flagrant disregard of the traditional rules as to burden of proof and the presumption of innocence in criminal contempt proceedings. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444; *Michaelson v. United States*, 266 U.S. 42, 66. And if it be granted that the order to proceed was erroneously given, then

it must follow that the fruits of that order are tainted with the same error.*

This Court will permit no man to stand convicted in a federal court on the basis of a coerced confession or on a record which contains evidence obtained through an unlawful search or seizure. Certainly the rule should be no less stringent where the evidence has been improperly adduced not by the prosecution but by the court itself. It is manifest that the evidence relied upon by the majority of this Court was not properly obtained. It was the direct and intended result of an erroneous ruling by the trial court, a ruling which stripped petitioner of the presumption of innocence and which forced him to assume the burden of proof. There was no other evidence, competent or incompetent. The fair administration of justice in the federal courts should not permit the affirmance of this conviction in reliance only upon the fruits of the trial court's gross error.

2. In concentrating on the first four items in the third specification to sustain the conviction, the majority of this Court did not deny the conceded fact that grave procedural errors were involved in the prosecution of the case. So grave were these errors that

* The fact that petitioner did not object to the presence in the supplemental record of the summary of exhibits introduced by him at the contempt trial—a fact mentioned in footnote 7 of the majority's opinion—does not free those items from the error which infected them by virtue of the trial court's ruling. Petitioner, of course, could not object to the inclusion of exhibits which were in fact introduced during the contempt trial by himself. But his failure to object to their inclusion in the supplemental record on appeal cannot be taken as a waiver of any objection he may have had to the manner in which such exhibits were originally elicited as a result of the trial court's ruling.

the Government made no pretense at justifying them before the bar of this Court. And there is no hint in the majority opinion of disagreement with the dissenters' view that "There have probably been few cases in the annals of this Court where the proceedings below were afflicted with so many flagrant errors."

Apart from the erroneous burden of proof thrust upon petitioner by the trial court, the flagrant errors which may fairly be said to be conceded by the Government and by the majority of this Court are:

- (a) The almost complete absence of any effort on the part of the Government to prove the alleged contempt and the prosecution's reliance on the trial court's personal knowledge of the case as a substitute for proof.
- (b) The express indications by the trial judge prior to the contempt trial that he believed petitioner to be guilty of false and evasive testimony as charged in the first specification.
- (c) The total failure to confront petitioner with competent proof of the alleged contempt and to permit him to cross-examine, explain or rebut such proof.
- (d) The use of incompetent hearsay testimony as a major element in the trial court's judgment of conviction.
- (e) The utilization of evidence not introduced at the contempt trial but contained in a supplemental record improperly filed in the Court of Appeals to secure an appellate affirmance of the conviction.

These errors were not mere harmless errors. They impregnated the whole case to such an extent that the four items in the third specification cannot legitimately be singled out as free from these errors so as

to sustain the conviction. There is no basis whatever in the record for assuming, as did the majority of this Court, that the trial judge actually did or conceivably could have considered the critical four items separate and apart from the prejudicial elements. Who can say with assurance that the trial judge's conclusion that there was adequate proof that petitioner failed to produce the four items was not affected by the erroneous factors he brought to bear on what he obviously considered to be the more important elements of the case? Did he look at these items in terms of the competent evidence only, or did he also consider the items in relation to his own personal knowledge concerning them? Did he have a preconceived idea as to petitioner's guilt relative to those items as he did relative to the first specification? Was the petitioner properly confronted with competent proof as to his failure to produce these items and given a full opportunity to cross-examine and rebut such proof?

The crucial consideration in this case must be the impact of the conceded errors on the mind of the trial judge in the total setting of the case. This must take into account what these errors meant to him in relation to the entire case, including the four items in question. As this Court said in *Kotteakos v. United States*, 328 U. S. 750, 765:

But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had

substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

See also *Krulewitch v. United States*, 336 U.S. 440, 445.

And so in this case, the procedural errors so tainted the processes employed by the trial court as to make it unfair to judge the validity of the conviction solely by reference to the questionable proof as to the four items in question. So egregious were those errors, so penetrating was their effect, as to make relevant the language and holding of this Court in *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124:

The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. United States*, 318 U. S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

When uncontested challenge is made that a finding of subversive design [or contemptuous conduct] by petitioner was in part the product of three perjurious witnesses [or flagrant procedural errors], it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's [or the Trial Court's] findings.

Only by reversing the conviction in its entirety and permitting a new trial free of the erroneous procedures can this Court make certain that justice will have been

done this petitioner. Only in that way can there be an untainted administration of justice in this instance.

3. The opinion of the majority of this Court contains other errors and omissions which justify reconsideration of the case:

(a) The statement (slip opinion, p. 5) that "the impounded books and records were present on the trial table" is erroneous and without warrant in the record before this Court. There is no indication in the record as to what was on the trial table, much less that the impounded books and records were there present.

(b) The statement (slip opinion, pp. 7, 9) that "Petitioner admits having previously examined the first two items" has reference to the rather ambiguous statement of the petitioner (R. 47) that he had "examined those other two records previously and was unable to find any evidence of slot machines." But to conclude, as did the majority of this Court, that this statement shows beyond a reasonable doubt that petitioner found and examined the two items at the time he was attempting to comply with the subpoena is both unwarranted and unfair.

Petitioner's remark obviously referred to an examination made by him during the short interval of a few hours immediately preceding the contempt trial. That such is true is demonstrated by the colloquy between petitioner and his counsel immediately after this remark (R. 48):

Q. Had you examined Respondent's Exhibit 4 prior to April 1, 1954?

A. No, I have not, sir . . .

Q. And have you with me today, following the hearing this morning, made some examination of the balance of these documents that appear on this table?

A. Yes, I have, sir.

Clearly, then, petitioner in using the word "previously" in the critical statement was referring to the period immediately preceding the contempt trial and not to the period prior to April 1. Any reference to the earlier period was made explicit by counsel. The only examination of any of the documents by petitioner was done immediately prior to the contempt trial. There was thus lacking any proof whatever that any of the four items had been found or seen by petitioner or were available to him during the time he attempted to comply with the subpoena.

(c) The majority opinion completely overlooks petitioner's contention in his main brief (pp. 56-58) that subpoena No. 160, which was involved in the third specification, was "not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up" and hence petitioner could not be held in contempt of such a subpoena under the ruling of this Court in *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221. The vice of the subpoena was not its broadness as such but the fact that it required the production of a vast array of documents, including records relating to coin-operated devices which have no relevance whatever to any prosecution under the Johnson Act (the Federal Slot Machine Act, 15 U.S.C. §§ 1171-1177). Petitioner was thereby forced to cull the good from the bad and to risk a judgment as to whether any or all of the documents were evidentiary or pertinent materials. It was precisely this kind of

a subpoena which this Court said in the *Bowman Dairy* case could not be the basis of a contempt conviction. Petitioner is entitled to the benefit of that ruling.

(d) The Court throughout its opinion measures petitioner's guilt in relation to the specific items mentioned in the third specification of the order to show cause rather than in relation to the language of subpoena No. 160. Obviously, if subpoena No. 160 had been as pertinent in terminology as the third specification of contempt we might have a different case. But the subpoena was not in those terms. It was a roving request for anything connected with coin-operated devices that might turn up, regardless of any relationship to what was pertinent to the pending Johnson Act prosecution. Thus again the *Bowman Dairy* doctrine becomes critical in judging petitioner's guilt.

CONCLUSION

For the foregoing reasons, it is respectfully urged that rehearing be granted and that, upon such rehearing, the judgment of conviction be vacated and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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March 22, 1957.